

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

MISDEMEANOR DIVISION

June 10, 2008

TRANSCRIPT OF THE PROCEEDINGS

IN RE: )  
 )  
 PETITION OF ) No. (None Assigned)  
 KNOX COUNTY PUBLIC DEFENDER )  
 \_\_\_\_\_ )  
 APPEARANCES:

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HONORABLE CHARLES A. CERNY, JR.  
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1                   (Whereupon, the aforestyled cause came  
2 on to be heard before His Honors Emery, McGee, Stansberry,  
3 Cerny and Jackson, and the following proceedings were had,  
4 to wit:)

5                   JUDGE EMERY: Good morning to all those  
6 assembled here. We'll try to get as many of you in as we  
7 can so you can hear, but we have obviously limited space in  
8 this facility. But it is conducive to having all five of us  
9 appear at the same bench.

10                  I guess I need to note who we have here,  
11 for the record.

12                  MR. STEPHENS: Your Honor, of course, I'm  
13 Mark Stephens; Hugh Moore, Max Bahner. Sitting at counsel's  
14 table, Aaron Love also will be serving in a capacity of  
15 presenting witnesses of the proof. Norm Lefstein is an  
16 expert who will be testifying on our behalf. Isaac Merkle,  
17 who is seated here at the end, and of course you know  
18 everybody in the audience. Do you know Mr. Dimond, Doug  
19 Dimond?

20                  JUDGE EMERY: Yes.

21                               MR. DIMOND: Doug Dimond from the  
22 Attorney General's Office, just by myself--

23                               JUDGE EMERY: There's no one here from  
24 the State Controller's Office.

25                               (Off the record discussions held simultaneously.)



1 JUDGE EMERY: And Ms. Sykes from the  
2 Administrative Office of the Court.

3 MR. STEPHENS: Your Honor, please, also  
4 - I'm sorry - Angela Williams is here on behalf of Max and  
5 Hugh and Aaron, as a part of that law firm, and she'll be  
6 assisting.

7 JUDGE EMERY: Okay. Thank you.

8 We are convened here this morning to hear  
9 proof of the Public Defender to suspend the appointment of  
10 cases of indigents in Misdemeanor Court. The Public  
11 Defender filed a sworn petition on March 26 of this year and  
12 requested the opportunity to present further proof in the  
13 way of live testimony to support his petition for relief.

14 We, as Judges, realize there is  
15 considerable interest in this proceeding, and that's why  
16 we've noticed the various agencies: State Attorney General,  
17 Administrative Office of the Court, Comptroller. Some  
18 people might ask, Why are we all here en banc? All five  
19 judges were served a copy of this petition for relief by the  
20 Public Defender, and we think that for the purpose of

21 judicial efficiency and economy that it is prudent to hear  
22 all the proof in regard to this matter one time rather than  
23 five. The decision as to whether to grant the relief that  
24 the Public Defender has sought obviously is going to be a  
25 decision made by each judge, but it makes a lot more sense

1 to have one hearing rather than five hearings.

2 I think, first of all, we need to  
3 probably, at the outset, take up the issue that's been  
4 raised about the jurisdiction that was noted in the State  
5 Attorney General's response that we received yesterday. As  
6 to the authority to conduct a hearing on bond, I think we've  
7 covered that. We hope it will facilitate the proof here and  
8 allow each of us to make an informed decision of what issues  
9 and facts are involved. It is obviously undisputed that we  
10 have the authority to grant relief under Rule 13. There are  
11 some collateral issues to that and how that it is to be  
12 done.

13 With respect to the State Attorney  
14 General's motion to intervene or a motion to join the AOC as  
15 a party, we noticed that there were basically three points  
16 of authority cited. One involved Tennessee Rule of Civil  
17 Procedure 19.01. The second involved Tennessee Rule of  
18 Procedure 24.01.

19 We think the beginning point of that  
20 discussion is that you start with the scope of the rules,

21 Rule 1, and the scope of the rules, Rule 1 says these rules  
22 shall not apply in General Sessions Court except in three  
23 instances, and none of those three instances is apposite to  
24 the hearing that we have here today. We do acknowledge,  
25 however, that the State Attorney General has an interest,

1 under the statutory duties described in Title A, to be  
2 involved in matters that affect the State, but we do not  
3 view this--and I've said this before informally, and we all  
4 have, that we do not view this as a trial or an adversary  
5 proceeding. We view this as a proceeding held pursuant to  
6 Rule 13. We certainly will consider the State's opinion if  
7 they have one - I think they do and want to express it - as  
8 to the scope and nature of any relief the Public Defender  
9 may receive if they're able to carry their burden of clear  
10 and convincing proof that relief is required under the rule.

11                   The order of proof, as we think it should  
12 go forward today, is to allow the statement on behalf of the  
13 Public Defender to open, have a presentation of witnesses in  
14 support of your motion. There may be questions asked by  
15 various judges on this panel, obviously, since they have to  
16 make that decision, and then hear from the State Attorney  
17 General.

18                   And you're not calling any witnesses?

19                   MR. DIMOND: No. I just have legal  
20 argument. What capacity do you plan to hear from the State

21 Attorney General; as a party, or as simply--or are you just  
22 going to hear from us, because we filed a motion to dismiss  
23 based essentially on legal grounds, Your Honor. So I just  
24 am not sure--this is an unprecedented hearing. I--

25 JUDGE EMERY: Oh, yes. It's not totally

1 uncharted waters, but it's somewhat uncharted waters.  
2 Obviously, there was a similar type proceeding--similar, not  
3 exactly the same, back in 1991, and that case, I think the  
4 State did not get involved in that.

5 Does anybody have any...

6 JUDGE MCGEE: I think in our discussions  
7 we have militated against formal structure here. We simply  
8 want to hear everybody's position.

9 JUDGE EMERY: And I would also note for  
10 the record that we did seek an opinion from your--from the  
11 office sometime ago about whether or not the law provided,  
12 summarily--summary suspension and relief to the scope that  
13 is being sought in this case.

14 MR. DIMOND: Do you prefer I stand or sit  
15 when I respond to Your Honor?

16 JUDGE EMERY: What?

17 MR. DIMOND: Do you prefer I stand or sit  
18 as I respond to--

19 JUDGE EMERY: We just want to make sure  
20 we get you. We can hear you all right. If the court

21 reporter can hear you and all the judges can hear you, you  
22 may sit.

23 MR. DIMOND: Yes, we did not do an  
24 opinion. That was certainly not out of any disrespect for  
25 the Court, but we haven't had--we always represent a party,



1 and we didn't feel that we could offer you an unbiased and  
2 neutral position that we could take when we usually do an  
3 opinion.

4 JUDGE EMERY: Okay. Then I think--any  
5 questions for--

6 JUDGE CERNY: Just as a practical matter,  
7 this courtroom has got an acoustic dead spot, and so when  
8 you're in the center, particularly what we're using as the  
9 witness stand, you'll have to speak loudly enough to be  
10 heard.

11 JUDGE EMERY: All right. Are we prepared  
12 to swear in the witness? I would ask at this time that all  
13 witnesses testifying in this proceeding here today come  
14 forward to be sworn.

15 MR. BAHNER: Your Honor, we are going to  
16 call some local lawyers this afternoon.

17 JUDGE EMERY: We'll swear them in at the  
18 appropriate time.

19 (Judge Emery swears the witnesses.)

20 JUDGE EMERY: Okay. Since it's not a

21 trial, we're not invoking the Rule either. We've all agreed  
22 to that for today.

23 Who's up first? Mr. Bahner, are you?

24 MR. BAHNER: Yes.

25 JUDGE EMERY: Okay.

1                   MR. BAHNER: May it please the Court, I  
2 am Max Bahner, with Hugh Moore and Aaron Love. We represent  
3 Mr. Stephens and the Public Defenders office. I would like  
4 to say, as a preliminary matter, that it is our view that  
5 the Attorney General does not have standing to participate.  
6 We acknowledge that this is something within the sound  
7 discretion of the Court, but I would make just a couple of  
8 points.

9                   The burden of the motion to intervene is  
10 based on the fiscal costs of the relief sought and in our  
11 view does not address the Tennessee Supreme Court Rule 8 or  
12 the Tennessee Supreme Court Rule 13, which we think govern  
13 here. Just for the record, I wanted to make that very brief  
14 statement of our position with regard to the Attorney  
15 General. We also think that there is an inherent conflict  
16 of interest between the Attorney General and the relief  
17 being sought here.

18                   I'd like to make a few comments  
19 preliminarily, if I may. Today we want to address with you  
20 an issue which I think is crucial to the justice system. We

21 know you're interested. You see the Knox County Public  
22 Defenders all the time in your courts. Everyone, whether a  
23 prosecutor or a defendant, whether they're practicing  
24 primarily civil or criminal law, and every person who cares  
25 about the American legal system has to be interested in the

1 issue of caseloads, workloads, and I'm not sure that  
2 caseloads and workloads are synonymous, and we are going to  
3 address that later during the proof.

4                   We're keenly aware of the issues facing  
5 our great state. We are Tennesseans, just as you are, and  
6 we are quite aware of that, but the issues we are concerned  
7 with here today are issues clearly within the jurisdiction  
8 of the Tennessee Supreme Court, and those are the ethical  
9 issues which govern the work of every lawyer who appears in  
10 our courts and every lawyer who practices law, and the  
11 constitutional issues which are important for the persons  
12 accused of crime will appear before you.

13                   The Preamble to the Tennessee Rules of  
14 Professional Conduct, Rule 8, notes that in all professional  
15 functions a lawyer should be competent, prompt and diligent.  
16 A lawyer should maintain communication with a client  
17 concerning the representation. As lawyers we should  
18 demonstrate respect to the legal system and for those who  
19 serve it, including judges, other lawyers, and public  
20 officials. While it's a lawyer's duty, when necessary, to

21 challenge official action, it's also a lawyer's duty to  
22 uphold the legal process. And that's what we are concerned  
23 with and what I know you are concerned with in this hearing  
24 today.

25                                   The ninth paragraph of the Preamble notes

1 that the nature of law practice, conflicting  
2 responsibilities are encountered. Virtually all--and I'm  
3 quoting: Virtually all difficult ethical problems arise  
4 from conflict within a lawyer's responsibilities to clients,  
5 to the legal system, and to the lawyer's own interest in  
6 remaining an upright person while earning a satisfactory  
7 living.

8                               We all know that the first ethical rule,  
9 Rule 1.1, is that a lawyer shall provide competent  
10 representation, competent representation to a client, and  
11 this requires legal knowledge and skill and thoroughness of  
12 preparation reasonably necessary for the representation.  
13 The third rule, Rule 1.3, is that a lawyer shall act with  
14 reasonable diligence and promptness in representing a  
15 client.

16                              The requirement set out in Rule 1.4 is  
17 that a lawyer shall keep a client reasonably informed about  
18 the status of a matter and comply with reasonable requests  
19 for information within a reasonable time. A lawyer shall  
20 explain a matter to the extent necessary to permit the

21 client to make informed decisions regarding the  
22 representation.

23                               It's important, I think, to note that if  
24 a lawyer's caseload/workload is too heavy, there's an  
25 implicit conflict of interest, which is forbidden by Rule



1 1.7(b), which says, and I quote: A lawyer shall not  
2 represent a client if the representation of that client may  
3 be materially limited by the lawyer's responsibilities to  
4 another client, unless the lawyer reasonably believes the  
5 representation will not be adversely affected and the client  
6 consents in writing after consultation. Rule 1.16 provides  
7 direction to lawyers who are declining or terminating  
8 representation when not to do so would result in violation  
9 of the Rules of Professional Conduct. So that's the first  
10 issue, the ethical rules of conduct which apply to every  
11 lawyer, whether a public defender or a prosecutor or working  
12 in any other sphere.

13                   Against this background our Supreme Court  
14 adopted Rule 13, which concerns the appointment of counsel  
15 to represent indigents who are charged with a crime. This  
16 rule springs out of the guarantees of the Federal  
17 Constitution and our State Constitution. Both the Sixth  
18 Amendment of the U.S. Constitution and Article I, Section 9  
19 of the Tennessee Constitution guarantee a criminally accused  
20 defendant the right to be represented by counsel. The

21 Tennessee legislature implemented this right, of course, by  
22 the revisions in Section 40-14-103 of the Tennessee Code and  
23 related statutes. The legislature authorized the Supreme  
24 Court to adopt the rules to accomplish these purposes, and  
25 that's when the Tennessee Supreme Court adopted Rule 13.

1                   So in this hearing today we want to  
2 explore with you how best to solve the problem that faces  
3 the Public Defenders Office and as a result which affects  
4 this Court. Counsel for the Public Defender are keenly  
5 aware that the prayer for petition that you consider today  
6 has a profound effect on the operation of this Court.

7                   This Court has an overwhelming caseload.  
8 I, frankly, have trouble understanding how a caseload this  
9 massive is handled. And I do no criminal work, really. I  
10 do civil. The Public Defenders Office also has an  
11 overwhelming caseload, and I don't understand how they do  
12 that. It could not occur in our firm or in any other civil  
13 practice which I am aware. And so together, with the bench  
14 and the lawyers and the Public Defenders office, we face  
15 issues of significant ethical and constitutional borders.

16                   From start to finish, this case involves  
17 lives. It involves the lives of the members of this Court.  
18 It involves the lives of the lawyers who appear before this  
19 Court from the Public Defenders Office, and it involves  
20 perhaps most importantly the lives of the persons accused

21 of crimes who cannot afford counsel, and it has a profound  
22 effect on their impression of the judicial system and the  
23 fairness of the judicial system and its ability to treat  
24 them as individual persons, and so today we want to explore  
25 this.

1                   We are not going to call all the  
2 witnesses we could. We are going to tailor our proof as  
3 best we can to move through this swiftly. And as I  
4 understand, Your Honors have agreed to just work straight  
5 through, and that is satisfactory with us.

6                   JUDGE EMERY: Thank you.

7                   MR. BAHNER: We'd like to call our first  
8 witness, and that's Mr. Stephens.

9                   EXAMINATION

10 BY MR. BAHNER:

11               Q           Mr. Stephens, for the record, would you  
12 please state your name.

13               A           I'm Mark Stephens.

14               Q           Are you the Public Defender of Knox  
15 County?

16               A           I am the elected Public Defender for the  
17 6th Judicial District.

18               Q           How many lawyers do you have on your  
19 staff?

20               A           Currently, I have 20 lawyers on the

21 staff.

22 Q Are there vacancies on your staff?

23 A There are. There are two vacancies, and  
24 there is a young man who is in the process of taking the bar  
25 exam.

1           Q           How many investigators do you have?

2           A           I have four investigators.

3           Q           How many clerks do you have?

4           A           Currently, during the summer months, we  
5 have three clerks. When school starts, that will go down to  
6 two, and we'll carry two clerks for the fall and two for the  
7 spring.

8           Q           And for the purposes of the Court and  
9 those who are listening to this proof, what are the  
10 responsibilities of the clerks?

11          A           The summer clerkships are predominantly  
12 research clerkships. They don't have much involvement in  
13 the court process. They have some specific case-related  
14 duties, but not much. Mainly what they are performing are  
15 research tasks and (inaudible).

16          Q           How many of the lawyers, the 20 lawyers  
17 on your staff, have five years or less of practice as a  
18 lawyer?

19          A           I currently believe that we have four  
20 lawyers or five lawyers with five years experience or less.

21 We recently lost a lawyer who had less than five, and I'm  
22 not sure of the totals right now, but I think we have about  
23 five lawyers with five years or less.

24 Q How many lawyers do you have assigned to  
25 each of the courts of Knox County--



1           A           There are--

2           Q           And we have an exhibit here, which I  
3 think may be helpful just because it will put it in  
4 everybody's mind. (Indicates.)

5           A           The Public Defenders Office covers seven  
6 courts. We cover all three divisions of Criminal Court. In  
7 Knox County Criminal Court Division I, we have two lawyers  
8 assigned to that division, both who have extensive  
9 experience.

10                   In Criminal Court Division II, we have three  
11 lawyers assigned to that division. One is a very young  
12 lawyer; a second lawyer who has, I think, three or four  
13 years experience; and then a third lawyer who has, I think,  
14 more than eight years experience. And then--and they are  
15 here. If I am misstating their level of experience they can  
16 correct me. And then in Knox County Criminal Court Division  
17 II, we have--Division III, we have two lawyers assigned to  
18 that division.

19                   In Misdemeanor Court we currently have  
20 four lawyers. We recently lost one. And we have an offer

21 outstanding to a lawyer who will be moving into that  
22 division if and when he accepts the offer. And so we have  
23 currently four lawyers working in two-person teams in  
24 Misdemeanor Court.

25 We have two lawyers assigned to DUI

1 Division. We have five lawyers assigned to Felony Division.  
2 They work in two teams, a team of three lawyers and a team  
3 of two lawyers. And then we have two lawyers assigned to  
4 Juvenile Court.

5 Q Does this chart, which is on the board,  
6 accurately reflect the assignments of lawyers from your  
7 office?

8 A Yes, sir, it does.

9 Q Have you had some difficulty in keeping  
10 lawyers on your staff?

11 A Yes, sir.

12 Q Why is that?

13 A Well, initially, what everyone told me  
14 would happen as I first became Public Defender is that I  
15 would hire a lawyer, I would train them, and within a couple  
16 of years they would move into private practice where they  
17 could enjoy the practice of law better than the environment  
18 of the Public Defender Office, but in fact that did not  
19 happen. We went about 11 or 12 years with very little  
20 turnover.

21               Recently, however, since 2004, I think we've lost  
22 either 21 or 22 personnel. Fourteen of those have been  
23 lawyers. And while they don't come to me and say, I'm  
24 leaving because of caseloads, they do come to me and say  
25 that they are leaving because they want to practice law the

1 right way, or they'll tell me that the pace of the Public  
2 Defenders Office is not a pace that they are willing to  
3 maintain over a prolonged period of time.

4 Q What do you--

5 A --part of that is that of the 14 lawyers  
6 who have left most of them were experienced lawyers, and so  
7 what happened necessarily then is I lost an experienced  
8 lawyer and replaced them with a new lawyer, a young lawyer  
9 that requires training and supervision. As lawyers, as we  
10 all know, there is just a learning curve.

11 Q What do you understand it to mean when  
12 they say they want to practice law the right way?

13 A They want to meet their professional  
14 obligations as it relates to their client. They want to  
15 handle the case the right way. They'd like to meet their  
16 client. They'd like to talk to them. They'd like to  
17 investigate the case. They'd like to talk to the family  
18 member. That's not to say that it doesn't happen in our  
19 office, but it happens so infrequently, or there are  
20 stressors associated with the lawyer trying to perform those

21 functions, and compromises are being made, but the stress  
22 and strain of the day-to-day rhythm of the Public Defender  
23 Office makes the lawyers feel as though they're processing  
24 cases, they're not being the full lawyer that they can be.

25           Q           Generally, what is the average ongoing

1 caseload of the lawyers in your office?

2           A           Well, I wish I could provide the Court  
3 with an absolute answer to that question. A lot of it  
4 depends on where the lawyer is situated. If the lawyer is  
5 in Criminal Court, for instance, they're going to have an  
6 active, open caseload of somewhere between about 70 cases to  
7 as high as maybe 120 cases. I think I have one lawyer  
8 currently in Criminal Court with 120 cases. Most of those  
9 cases or a high percentage of those cases are cases that are  
10 set for trial, and most of those trial settings are within  
11 90 days to 120 days.

12           When it gets to Juvenile Court, it's a little  
13 easier to--well, what I can give you for Juvenile Court are  
14 annual numbers. We run about, roughly, 15 hundred cases, 13  
15 to 15 hundred cases a year in Juvenile Court, and we have  
16 two lawyers that handle that. So somewhere between six to  
17 seven hundred and fifty cases. They turn those cases over a  
18 couple of three times a year. And so a lawyer in Juvenile  
19 Court is going to have an active, open caseload of around  
20 200 cases at any given time.

21               As you move into the specific divisions of Sessions  
22 Court, that also varies. The numbers in DUI Court are very  
23 similar to Juvenile Court; whereas, the two lawyers assigned  
24 to that court are going to handle about 15 to 17 hundred  
25 cases a year. That's about 850 cases apiece. And they turn



1 those over three, four times a year, and so at any given  
2 time the lawyer is going to have connected to him or her  
3 200, 250 cases at a time. When we move into Felony Court,  
4 we'll see lawyers responsible or at least attached to 150 to  
5 200 cases at any given time.

6 Q Is there a difference between filings and  
7 cases?

8 A Yes, sir.

9 Q Please explain that briefly.

10 JUDGE MCGEE: Excuse me a moment. I want  
11 to go back. I got that in Felony you're going to have 150,  
12 200 cases, current caseload. What was the court you  
13 described before that; DUI or--

14 MR. STEPHENS: DUI.

15 JUDGE MCGEE: And it was what?

16 MR. STEPHENS: I think there's a couple  
17 of hundred, maybe 200 to 250 open, active cases that are  
18 assigned or attached to a specific lawyer.

19 BY MR. BAHNER:

20 Q At any given time?

21                   A                   At any given time.

22                   The numbers in Misdemeanor Court are a little  
23 higher than that. There are around 35 hundred. I think  
24 right now we're doing about 35 hundred cases annually in  
25 Misdemeanor Court. We have four lawyers in that court. So

1 it's not quite a thousand cases per lawyer annually. And  
2 then when you ask how often they turn them over, likewise  
3 they turn them over - and what I mean by "turn them over" is  
4 they get assigned to the case and some disposition occurs to  
5 where it no longer is assigned to them - somewhere in the  
6 90- to 120-day range. And so I guess they turn them over  
7 about three or four times a year.

8 BY MR. BAHNER:

9 Q Mr. Stephens, is there a difference  
10 between caseload and workload?

11 A Well, there is. And if I could, let me  
12 answer your question about filings versus cases. Our case  
13 management--well, when Joe Client is arrested and charged  
14 with seven warrants, each of those seven warrants are  
15 entered into our case management system, and that's what we  
16 call a filing. And, I'm sorry, sometimes we call it a  
17 charge. We use different terms for the same thing. So  
18 you'll often hear us talk about charges or filings, and  
19 basically what that is, is that's a warrant.

20 However, there is a state statute that defines a

21 case, and it requires in instances for us to group filings  
22 by--this is just a rough explantation of the statute. But  
23 what the statute basically says is a single defendant, a  
24 single course of conduct occurring over a 24-hour period of  
25 time, and so I think I'm correct in this. If Joe Client

1 goes into in a parking lot and burglarizes seven cars, there  
2 will be seven warrants issued against that individual.  
3 There will be seven filings. There will be seven charges.  
4 But there's one case. It's a single course of conduct  
5 occurring by one individual over a 24-hour period of time.  
6 And so for case counting purposes, that's one offense.

7           For filing purposes or for the institutional strain  
8 on the Public Defender Office, that's seven filings, which  
9 means a secretary has to enter seven cases into the system.  
10 Conflict checks have to be done on seven individuals. All  
11 seven of those warrants have different victims, and so  
12 interviews have to take place with seven different  
13 individuals.

14           And so, I don't care how we characterize them. If  
15 we want to call that as one case, that is a caseload unit,  
16 but a workload unit is the work that has to be done in  
17 relation to the number of warrants or filings, and certainly  
18 the one case that I've described has a workload equivalent  
19 that's significantly greater than if Jane Client  
20 burglarizes one car, that workload is not the same as Joe

21 Client who may be charged with burglarizing seven cars.  
22 They count the same for purposes of caseloads. Both of  
23 those cases would be identical in terms of the unit or the  
24 measure for caseload, but it's very different in terms of  
25 work.

1           Q           And how does this workload impact the  
2 work of the lawyers in your office?

3           A           Well, the lawyer has an obligation to do  
4 certain things as it relates to each warrant. The fact that  
5 the AOC or the courts or the legislature wants to call it a  
6 single case, there are still obligations and duties the  
7 lawyer has as to each filing. The lawyer has a duty to  
8 contact each of those clients and attempt to interview them  
9 when they're available. They have a duty to interview the  
10 police officers and the court filings...more work.

11          Q           Let's talk for a minute about the ethical  
12 obligations on a public defender lawyer in defending a  
13 person charged with a crime. What are the ethical duties--

14          A           Well, our--

15          Q           --professional responsibility. Excuse  
16 me.

17          A           Our Tennessee Supreme Court has told us  
18 that while they are not going to develop a specific litmus  
19 test of the duties and responsibilities that each lawyer  
20 has, they tell us to look to the ABA standards for criminal

21 justice, the defense function, and if you look to the ABA  
22 standards the ABA standards dictate pretty clearly what  
23 responsibilities lawyers have with regard to their  
24 representation of the client, and those duties include the  
25 lawyer has an obligation to establish a relationship of



1 trust and confidence with the accused.

2           They have to communicate with the client,  
3 discussing, among other things, the objectives of the  
4 representation. They have to ensure privacy essential for  
5 confidence and communication between defense counsel and the  
6 client. They have to determine all relevant facts known to  
7 the accused as soon as practical. They are required to  
8 inform the accused of all of his or her rights at the  
9 earliest possible opportunity and take all the necessary  
10 action to vindicate such rights.

11           They must consider all procedural steps which may  
12 be taken on behalf of the client. Those include--some of  
13 those include seeking a pretrial release work program,  
14 obtaining psychiatric examinations when needed, moving for a  
15 change of venue or moving for a continuance, moving to  
16 suppress illegally obtained evidence, moving to sever  
17 jointly charged defendants. They have an obligation to  
18 conduct a prompt investigation of the circumstances of the  
19 case, exploring all avenues leading to facts relevant to the  
20 merits of the case in defending them without a conviction.

21 They have to avoid interviewing a prospective witness except  
22 in the presence of a third person, which means the lawyer  
23 can't necessarily fill that obligation if there's no  
24 investigator available to him or her to go out and accompany  
25 them on those interviews.

1           After being fully informed of the facts and the  
2 law, defense counsel should advise the accused with complete  
3 candor concerning all aspects of the case, including a  
4 candid estimate of the probable outcomes. Defense counsel  
5 should explore the possibility of an early diversion in the  
6 case with a criminal process through the use of other  
7 community agencies. A--

8           Q           Without going through the rest of the--

9           A           Yes, sir.

10          Q           --litany of those, which are in the  
11 petition, would the workloads carried by the Public  
12 Defenders in your office--can they do these tasks today?

13          A           No, sir.

14          Q           Why can they not?

15          A           The men and women in my office, the  
16 lawyers are dedicated lawyers, but the caseloads are such  
17 that there is no possible way that they can perform all of  
18 these tasks that they are ethically required to fulfill in  
19 all of the cases that we give them to do. There's no  
20 possible way.

21                   Q               What is the impact of the workload on the  
22 requirements of guaranteeing the constitutional rights of  
23 the accused?

24                   A               In my opinion, having been there for 18  
25 years, the rights of the accused are adversely affected by

1 the caseloads that are put upon these lawyers and the  
2 ethical obligations that they are attempting to fulfill.

3 Q How has your office operated during these  
4 years, with the caseload and workload levels that you  
5 carry?

6 A This is a--it's a shameful answer for me  
7 to make, but there is a rhythm that develops in Sessions  
8 Court, and it is easy, albeit shameful...it is easy for me  
9 to fall into the rhythm and to cut corners so as to be able  
10 to maintain and otherwise--well, what I like to say is to be  
11 able to manage an unmanageable docket.

12 The docket is unmanageable. The docket that these  
13 lawyers are given, the caseloads these lawyers are given are  
14 unmanageable, and the only way you can get from Point A to  
15 Point Z is to compromise and to cut corners.

16 Q Can you give us some illustrations of the  
17 kinds of corners which are commonly cut?

18 A My lawyers, particularly my lawyers in  
19 Sessions Court, are on a two-week rotation. They are  
20 preparing one week, and they are in court the second week.

21 The week that they are preparing they are regularly  
22 preparing more cases than there are time slots to even  
23 interview the clients. And so when I go through--

24 Q How long are those time slots?

25 A We block off 30 minutes for an interview

1 with the client, which is not sufficient. But if you look  
2 at a lawyer who has maybe a hundred cases set next week, if  
3 you take a 40-hour work week, take a 50-hour work week, take  
4 an 80-hour work week, whatever you want to take, there are  
5 more clients than can possibly be interviewed in the course  
6 of a prep week and do anything else. But these lawyers, the  
7 other obligations that they have, go far beyond just an  
8 initial interview with the client. And so what's happening  
9 is they're lucky if they can interview every single client  
10 before they get to court.

11 And, Mr. Bahner, I'd like to tell you, one of the  
12 most disgraceful things that has happened in our office  
13 (indicates)...there have been instances where clients have  
14 called for appointments...and we have told them that they  
15 couldn't have one.

16 Q Does this 30 minutes allow for interviews  
17 with witnesses or potential witnesses?

18 A No, sir. The 30-minute slots that we're  
19 talking about is if you just simply take a number of the  
20 cases of clients that a lawyer would typically handle in one

21 week of court. If you take a 30-minute slot those clients,  
22 those initial client interviews will take up their entire  
23 week, and so there's nothing left to do any on-scene  
24 investigations. There's nothing left to do any contacting  
25 of officers we talked about. There's no witness--there's no



1 time to interview any witnesses. You just go into court and  
2 you fly by the seat of your pants to see what you can  
3 accomplish. And I don't mean to be disrespectful to my  
4 lawyers, but in large measure that's what's happened.

5 Q In your experience, do you think that as  
6 a result of the caseloads and workloads and the limits on  
7 time that persons who were innocent have been convicted or  
8 have pled?

9 A I can't answer that question. And the  
10 dilemma that we're faced with today is, as we typically talk  
11 about effective representation of counsel it's a  
12 retrospective discussion; in other words, you look at how  
13 the lawyer performed and you look at the outcome, you look  
14 at what the lawyer failed to do when you make a decision  
15 about whether or not that failure affected the outcome of  
16 the case.

17 In this situation, you don't have enough  
18 information to determine whether or not innocent parties  
19 have pled guilty or not. I suspect they have. I couldn't  
20 point you to a specific incidence.

21                   Have I been ineffective in my representation over  
22 the last couple of years? I suspect that I have. I don't  
23 know that I could point you to a specific case and a  
24 specific deficiency that resulted in prejudice to a client  
25 of mine, but that's not to say that it didn't happen. And

1 with the volume that these lawyers are handling and with the  
2 number of cases that are pleading, it seems to me that over  
3 the course of the year there ought to be four or five--out  
4 of four or five thousand cases in a specific division, you  
5 would think that at the end of a hearing somebody's going to  
6 be declared innocent at some point, and I'm not sure I could  
7 tell you that that's ever happened, as well.

8 Q In addition to your managerial duties as  
9 Public Defender, do you handle a caseload?

10 A I do.

11 Q What sort of caseload do you have  
12 currently?

13 A Currently, I think I have 12 cases that  
14 are active. Most of my cases are first degree murder cases.  
15 I think I may have an attempted first degree, or I have  
16 basically violent crime in the first degree murder category  
17 or Class A category.

18 Q As the elected Public Defender and  
19 responsible for the operation of your office, do you have an  
20 opinion as to whether, in the courts in which your office

21 provides representation to indigents charged with a crime,  
22 there is any crisis?

23           A           There is a crisis in my office.

24           Q           Why do you say that?

25           A           The caseloads that currently exist in my

1 office, in my view, prohibit my lawyers from fulfilling  
2 their ethical obligations and duties that they owe to the  
3 client. They cannot do that. And, consequently, the  
4 constitutional right of the accused to have a lawyer who is  
5 meeting his or her ethical responsibility to that client is  
6 not being fulfilled, and it's because of caseload, it's not  
7 as a result of the commitment or effort on the part of the  
8 lawyers.

9 Q How do lawyers in your office have to  
10 practice?

11 A My lawyers--I get to work most  
12 mornings--not all mornings, but I get to work most mornings  
13 at 6:00. I am not the first person in my office. And what  
14 I see progress over the course of time is that lawyers, the  
15 first thing they usually do is give up their holidays. They  
16 realize that a holiday could be very valuable. There's no  
17 calls coming in and there's no court that you have to go to,  
18 and so you can get a lot done on a holiday.

19 And then the second step is you find out, Well, you  
20 know, Saturday, there's no court on Saturdays either, and so

21 almost--not all of my lawyers but most of my lawyers work on  
22 the weekend. Most of my lawyers don't take their annual  
23 leave allotment, because they can't afford to do that  
24 because the workload piles up. It's almost to the point  
25 where if you miss a day you almost regret not being there,

1 because there's no additional time in the future to make up  
2 for what you're missing today. All you're doing is cramming  
3 more into a day that you already don't have enough time to  
4 fulfill your obligations.

5 As Scott Carpenter says, beautifully I think, he's  
6 always working behind himself. He's always doing today what  
7 needed to be done two or three weeks ago or two or three  
8 months ago. I feel like I've never had a day where there  
9 wasn't something I had to do that if I didn't get it done  
10 that day the sky was going to fall. I never have felt like  
11 I've had a day in my office where I can work under normal  
12 circumstances.

13 Q As a result of what you have experienced  
14 in your office and your observations, did you write a letter  
15 to the members of this Court in June of last year, June 15?

16 A Yes, sir.

17 Q And in that letter did you suggest that  
18 you felt like you needed to stop taking appointments?

19 A Yes, sir.

20 Q Did you stop taking appointments?

21                   A               No, sir.

22                   Q               Why did you not?

23                   A               I think, Mr. Bahner, you made reference,  
24   you had a phrasing in opening statement something about the  
25   fair administration of justice or something along those



1 lines. I felt when I wrote the letter in June, naively, I  
2 guess--now looking back on it a year later, naively,  
3 certainly. I felt like this was something that we would  
4 resolve in the next couple of months, and the disruption to  
5 the Court and the fair administration of justice, the damage  
6 to the clients to summarily stop taking appointments was  
7 such that if we could survive another couple of months we  
8 could get relief and manage these caseloads. And then two  
9 months turned into three months, and I believed in September  
10 we'd be filing a petition. And then the more I worked the  
11 more I realized there was more work to be done. And I was  
12 always under the assumption that, Well, next week we'll get  
13 the petition filed and we'll get a hearing within a month.  
14 I certainly thought we'd have a hearing before the end of  
15 last year. And so I bought into that rhythm of the Court.  
16 I bought into, you know, it's Sessions Court, it's been done  
17 this way for 20 twenty years, so just do it. And  
18 embarrassingly and in hindsight - and I shouldn't have - I  
19 continued to allow us to accept cases while the situation  
20 was beyond critical.

21                   Q               Did you ask us to represent you in  
22 preparing and filing a petition?

23                   A               Yes, sir.

24                   Q               And in connection with that, did we ask  
25 you for a lot of information which you did not then have?

1           A           Yes, sir. I have a case management  
2 system which was created in 1994 for a civil firm. Isaac  
3 Merkle has done voluminous work in converting that to a case  
4 management system that works for our office. But it is  
5 extremely difficult for me to produce accurate caseload  
6 data, and so literally for seven or eight months Mr. Merkle  
7 engaged in a process, from last June until about January or  
8 February of this year, to work through this antiquated case  
9 management system so that we could produce for the Court the  
10 most accurate, current data that we could possibly produce,  
11 and that process was much more difficult than I expected and  
12 delayed the relief that I really naively believed I would  
13 have within about 30 days of writing the Court the letter.

14           Q           You suggested in the sworn petition which  
15 you filed that you would like the Court to suspend  
16 appointments of your office to represent individuals charged  
17 with crimes in the Misdemeanor Division. Why did you make  
18 this suggestion?

19           A           Well, I have four reasons for that. The  
20 solution to my problem is lawyers. That's what I need. I

21 need lawyers. And this Court can't find me lawyers. This  
22 Court can't create lawyer positions and fund lawyer  
23 positions for me. And so part of what I'm trying to do is  
24 to accomplish both. This Court can give me caseload relief,  
25 and so I'm hoping that this Court would consider doing that.

1           But I've also created a way, I think, of finding  
2 lawyers, and that would be to stop taking cases in the  
3 Sessions Court Misdemeanor Court, which would allow me then  
4 to take, currently, the four lawyers who are assigned in  
5 that court and reassign them to other divisions of the  
6 court, to where I wouldn't necessarily have to go to those  
7 courts and ask for caseload relief.

8           The reason I chose Misdemeanor, as set out in the  
9 petition, there's four reasons. One is the potential loss  
10 of liberty in Misdemeanor Division of Sessions Court is less  
11 than it is in other divisions of court, for the most part.  
12 And so, with ultimate concern for the client and the  
13 client's potential loss of liberty, the damage to the client  
14 would be less if we're not handling cases in Misdemeanor  
15 Court than in any other division.

16           Secondly, the nature of the offenses that are in  
17 that court typically involve injury of third-party victims  
18 less than they do in other courts, and so out of respect to  
19 third-party victims the nature of the offenses in  
20 Misdemeanor Court tend to be more driver's license offenses,

21 misdemeanor theft, possession of drug paraphernalia, types  
22 of offenses that don't necessarily involve victims of third  
23 parties. So we were trying to consider that as well.

24           Of course there's a significant financial stress on  
25 the State if we pull out of Misdemeanor Court, but the

1 financial strain to the State is the least, we think, in  
2 Misdemeanor Court than it is in any other court. The AOC  
3 would pay local lawyers--I think they would pay local  
4 lawyers to handle these cases if they were appointed and a  
5 public defender isn't, and the average fee claim in  
6 Misdemeanor Court is less than the average fee claim in  
7 Felony Court. I don't know what the average fee claim in  
8 DUI Court is, but I believe--but I only have two lawyers in  
9 that court, so if I chose to seek the remedy in DUI Court  
10 I'd only be gaining two lawyers on that, and it wouldn't  
11 solve the problem I have in the other courts.

12           Also, fewer cases seem to be bound over out of  
13 Misdemeanor Court than in other courts, and so the gap in  
14 representation from private counsel to then public defender  
15 in Criminal Court would be smaller if it's only in  
16 Misdemeanor Court that this relief is granted. And so, to  
17 me, it took into consideration the court, it took into  
18 consideration the financial concerns of the State to try and  
19 minimize those as much as possible. It took into  
20 consideration victims and their right to have their case

21 heard as expeditiously as possible, but ultimately it took--  
22 they're my clients, and the clients' potential loss of  
23 liberty is the least, I believe, in Misdemeanor Court than  
24 in Felony or any more serious courts.

25 Q For purposes of comparison, Mr. Stephens,



1 just roughly how much would it cost the State to provide an  
2 additional four public defenders compared with the alleged  
3 costs of providing private counsel to represent these  
4 people?

5           A           Public Defender starts--his starting  
6 salary is around \$42,000. I'm told you have to add about 25  
7 percent to that figure to carry benefit costs, and so you  
8 get a starting level salary somewhere in the 55 range. So  
9 let's say I need 10 lawyers, and I do. Five hundred and  
10 fifty thousand dollars, roughly, gives me 10 starting  
11 positions.

12           Now, if I got 10 lawyers of course I'd have to have  
13 some secretaries and I'd have to have some investigators,  
14 but certainly my problem--there's no doubt that the average  
15 costs of a case for a public defender runs around \$200 a  
16 case. Appointed lawyers run significantly higher than that.  
17 And so, from a cost efficiency standpoint--and this is not  
18 to disrespect my brothers of the bar, the private lawyers  
19 who I wish there were more of. Public defenders seem to  
20 be--and, in fact, it may even be an insult to us. But

21 public defenders seem to be able to do the work cheaper than  
22 private lawyers. I would suggest to you that's because  
23 we're not doing the same level of work that the private  
24 lawyers might be doing, and so that might be why we're  
25 cheaper. But there are economies of scale. And so for

1 roughly \$750,000 to about \$900,000 you could solve the  
2 problem in the Public Defenders Office. The Public Defender  
3 would likely be able to represent a larger percentage of its  
4 own caseload in Knox County, which is a far cry from the 2.7  
5 million dollars or 2.4 million dollars that the relief I'm  
6 requesting might cause the State if private lawyers were  
7 asked to handle all these cases. So, certainly, the  
8 financial remedy is cheaper for the legislature to  
9 adequately fund the Public Defender Office, but the State is  
10 in crisis, I guess.

11 Q Mr. Stephens, we are looking for  
12 solutions here. Have you thought about other solutions  
13 which might work, or have you considered other solutions--

14 A Yes, sir.

15 Q --and if so, please tell the Court what  
16 you considered and why you rejected those.

17 A I think that if the relief that we're  
18 requesting here is not granted, and certainly I don't mean  
19 to be disrespectful to the Court - this isn't a threat - but  
20 what we'd be forced to do or required to do at that point

21 would be to go into each individual court and have a hearing  
22 in each individual court and stop appointments there for a  
23 period of time, in order to allow us to get the caseloads  
24 down to where we need to be. And so what we're doing here  
25 affects one court and one group of clients. If we're not

1 successful in this effort, then what we'll do is we'll have  
2 to affect seven courts and an array of clients, clients who  
3 are charged with serious felonies, clients who are charged  
4 with misdemeanor offenses, and clients who are charged with  
5 everything in between.

6 Q Is the situation with the workloads  
7 provided by your office pervasive in all of the courts in  
8 which you practice?

9 A It is now. It was not when I wrote the  
10 letter back in June. I thought, back when I wrote the  
11 letter in June, Criminal Division III was doing all right.  
12 Criminal Court Division III has seen an increase in Class A  
13 felonies, and I've got some lawyers who are struggling  
14 maintaining their current load with the influx of Class A  
15 felonies. I think Mr. Carpenter advised me he picked up  
16 some six, eight felonies in the last 30 days. So he's in  
17 trouble.

18 Q What other solutions have you thought  
19 about, other than having to go to each court every time?

20 A Quitting is not an option, so somehow we

21 have to work through this. We need the relief that we've  
22 requested in Misdemeanor Court or we're going to be forced  
23 to go to each individual court and stop the--we have to stop  
24 an influx of cases. There's only two solutions: Stop the  
25 influx of cases or give me adequate resources. That's the

1   only two choices.

2                   Q           What are the standards, Mr. Stephens, by  
3   which the objectiveness of the Public Defenders Office are  
4   judged, and specifically, the legal staff? I direct your  
5   attention to the Strickland case, Strickland against  
6   Washington.

7                   A           Well, I think when you talk about  
8   effective assistance of counsel - and as I've said earlier,  
9   it's almost always a retrospective analysis - where a lawyer  
10  has to perform at a level--at the lowest level of other  
11  legal providers within his or her community, and even if the  
12  lawyer fails to maintain that legal threshold, if the client  
13  hasn't incurred prejudice as a result of the deficient  
14  service provided by the lawyer, then technically the court  
15  won't find ineffective assistance of counsel. So you have  
16  to have a deficient performance and you have to have  
17  prejudice.

18                  Rule 13 doesn't contemplate a retrospective  
19  analysis of determining effective assistance of counsel.  
20  What it tells me I have to do is look prospectively and

21 determine whether or not my lawyers are going to be  
22 affected, and so really the prejudice component, I don't  
23 know any way to implement a forward, prospective looking  
24 analysis of prejudice. All I can say is if this is what a  
25 lawyer has to do, if this is what our Supreme Court has told



1 us are the duties that a lawyer who is engaged in the  
2 representation of a citizen accused must perform and I know  
3 now they can't perform with their current caseload, then I  
4 certainly know they can't perform those duties if you add  
5 one more case to it.

6 Q Are you familiar with the caseloads  
7 recommended by the National Advisory Commission on Criminal  
8 Justice Standards?

9 A Yes, sir, I am.

10 Q We'll have Ms. Williams put up this board  
11 which has those workload standards on it.

12 MS. WILLIAMS: (Complies.)

13 BY MR. BAHNER:

14 Q For the record, would you please just go  
15 down that list and read it into the record.

16 A NAC standards were created, I believe, in  
17 1978, and those standards established--I think it's 1978.  
18 Those standards established that no lawyer should handle  
19 more than 150 felonies per attorney per year, or 400  
20 misdemeanors, excluding traffic, per attorney per year, or

21 200 Juvenile Court cases per attorney per year, or 200  
22 Mental Health Act cases per attorney per year, or 25 appeals  
23 per attorney per year.

24               What the NAC standards say is when a lawyer handles  
25 a mixed bag, then there will be some number in between the

1 150 and the 400, and so it's up to a lawyer to determine if  
2 he has one of each of those types of cases, and it would be  
3 up to a lawyer to determine--

4 (Interruption of the proceedings.)

5 A --a caseload that doesn't exceed the  
6 400--excuse me, doesn't exceed the 400.

7 MR. BAHNER: May it please the Court, I  
8 would like to introduce this copy as an exhibit, if I may.

9 (Off the record discussion.)

10 MR. BAHNER: Yes, I would like to mark  
11 that as Exhibit 1 and this as Exhibit 2.

12 (Whereupon, the Knox County P.D. Office Assignment  
13 of Lawyers was introduced as Exhibit No. 1, and the NAC  
14 Standard 13.12 was introduced as Exhibit No. 2.)

15 MR. BAHNER: We are going to substitute  
16 that piece of paper for the board.

17 BY MR. BAHNER:

18 Q Do you understand, Mr. Stephens, that  
19 these numbers are the maximum numbers of cases that a lawyer  
20 can handle during the course of a year?

21                   A                   I do.

22                   And also, Mr. Bahner, if I might comment. When I  
23 first was elected Public Defender in 1990 and learned of the  
24 NAC Standards, my initial reaction was that they are low,  
25 that there were institutional capacities and strengths that

1 allowed me to handle more cases than certainly those numbers  
2 would suggest. Eighteen years later I can tell you that I  
3 have seen the wisdom of those numbers.

4           When you look at a calendar year, there's 356 days  
5 in a calendar year and there's 52 weekends, and you back out  
6 104 days on those weekends and that leaves you with - do the  
7 math - somewhere around 250 days. If I'm going to handle  
8 150 felony cases in the course of a year, that means I don't  
9 have two days a year to handle a felony. And the truth is  
10 some felonies I can handle in 16 hours or 21 hours of work,  
11 but the fact is there are lots of felonies out there that  
12 you can't even get around (phonetic) in 15 to 20 hours. And  
13 we all know there are felonies that require hundreds of  
14 hours. So when I look at the NAC Standards now, 18 years of  
15 more experience than I had when I came in, in 1990, those  
16 numbers are maximum numbers, and those numbers may be high.

17

18           Q           How are the salaries of public defenders  
19 calculated, on how many hours a year?

20           A           The State requires them to work 37.5. I

21 think a work week is 37.5 hours.

22 Q And so, during the course of a year, how  
23 many hours a week is that, roughly?

24 A I think the Attorney General has  
25 calculated that--I'm sorry, not the Attorney General. I

1 think the District Attorney, in their caseload study,  
2 calculated 1,750 hours. You take 50 times 37.5, eighteen  
3 hundred. Somewhere around 1,750 or 1,800 hours, something  
4 like that.

5 Q Have any of your Public Defenders worked  
6 just 1,750 or 1,800 hours in the course of a year?

7 A No, sir. Nobody in my office works just  
8 1,750 hours a year; secretaries, investigators, nobody.

9 Q Do you have any idea how many hours a  
10 year that you work?

11 A Well, of course, it differs. But like I  
12 said, I come to work about 6:00 in the morning and I'm not  
13 the first person there. Marie Steinbrenner beats me to the  
14 office just about every single day, and I get there around  
15 six. I've driven by the office at 11:30 at night and Marie  
16 Steinbrenner's car has been in the parking lot, she's still  
17 at work in that office.

18 Pat Leonard and I arrive at the office just about  
19 the same time every single day. And that's not to single  
20 out anyone, but there are lawyers--there's never been a

21 Saturday that I haven't come into the office that Scott  
22 Carpenter is not there. There's never been a Sunday night,  
23 I don't think, or not many, that Bob Edwards--the lawyers  
24 are working far beyond 40-hour weeks. How much beyond? It  
25 depends on the week and it depends on the individual. It



1 depends on the particular stresses that they are under at  
2 the moment.

3 Q In your view, as the elected Public  
4 Defender, when a person is assigned to your office to be  
5 represented, what do you think is the minimum that the  
6 lawyer has to do in order to adequately represent that  
7 person?

8 A Let's just take the Sessions Court  
9 representation. I think a lawyer who is appointed to  
10 represent an individual should meet immediately with the  
11 client. If the client is in custody, that meeting should  
12 take place quickly. Almost simultaneously the lawyer should  
13 be collecting the relevant documents, and that is the arrest  
14 report, the police report, the 911 report, any news accounts  
15 of that particular case if there are any. The lawyer should  
16 immediately identify who the witnesses are, and the lawyers  
17 should make efforts--well, after the initial interview takes  
18 place with the client, the lawyer should sit back and assess  
19 and develop a strategy for how to adequately prepare the  
20 investigation of this case. The investigation will include

21 attempting to contact the police officer and any witnesses  
22 that are listed in that case.

23           And almost as important as talking to the  
24 client there should be an interview with the family.  
25 Oftentimes our clients are not the best historians in terms

1 of their ability to give an accurate account of what  
2 happened that led to the charge. But more importantly,  
3 historically there's oftentimes been events and  
4 circumstances in their life that leads them to not be  
5 capable or not willing to provide the kinds of information  
6 that a lawyer needs.

7 I would like to say, with all due  
8 respect, there is a sense, having represented people within  
9 the Public Defenders Office for 18, going on 19 years, there  
10 is a sense of "this doesn't make sense" between the client  
11 and the lawyer. When I interview a client, my client is, at  
12 least initially, almost always distrustful. And if you look  
13 at it, it makes sense that they would be distrustful. The  
14 State is paying a prosecutor to put them in jail. The State  
15 is paying a police officer in many instances to prosecute  
16 them, and the State is paying a lawyer to defend them  
17 against a prosecutor they're paying to prosecute them. Just  
18 on a very superficial level it's difficult for clients to  
19 understand.

20 The clients know what my caseload is, or at least

21 the rumor mill is out. They know what the caseloads are.  
22 And they don't believe I'm a real lawyer, because if I was a  
23 real lawyer I certainly wouldn't be staffed with the Public  
24 Defenders Office, I'd be out in private practice making all  
25 the money that private practitioners make, and I'd be able

1 to manage my own caseload. So, at least initially, you're  
2 almost always confronted with distrust, hesitancy, "Are you  
3 the man, are you going to represent me, why would you want  
4 to represent me, why would you care about me?" That's  
5 what's going on at that initial interview.

6 I never go see a client and ask him to tell me what  
7 happened. Never. They're never at that point in the  
8 relationship where they're willing to do that. I wouldn't  
9 be willing to do it if I were the client.

10 Q Are your lawyers able to establish  
11 relationships with the clients, as a common matter?

12 A Well, no.

13 Q Why?

14 A Well, the nature of Sessions Court makes  
15 it a little difficult because they have strict time frames.  
16 Sometimes they have to get that case presented within 10  
17 days, so that presents additional challenges. I guess what  
18 I could say is I think my lawyers are challenged almost  
19 beyond the point of being able to accommodate one interview  
20 before court. To suggest that there would ever be a

21 follow-up interview--and what the court I think might be  
22 thinking is, Well, but you know, you could also pass that  
23 case the first time. Well, all that does is just add to the  
24 misery that already exists in terms of what your next week  
25 has or holds for you in terms of the amount of interviews.

1 If you pass it you're just trying to cram another interview  
2 into a week that you don't have enough time to do interviews  
3 to begin with. And so the lawyer-client relationship  
4 doesn't form in a healthy way, and I don't see how it  
5 possibly could form, because the lawyers don't have the time  
6 to work through at least the initial apprehension and  
7 suspicion and distrust most clients reasonably have when  
8 they find out they're being represented by a public  
9 defender.

10 Q Have you heard the terms "vertical  
11 representation model" and "horizontal representation model"?

12 A Yes, sir.

13 Q What are those terms?

14 A Vertical representation is the preferred  
15 model. It's the ABA recommended model where an individual,  
16 a client, introduces himself or herself to the Public  
17 Defenders Office, is assigned a lawyer who then works that  
18 case to its ultimate resolution, whether it's in the  
19 Tennessee Supreme Court or the United States Supreme Court,  
20 but as long as that individual is a client in the Public

21 Defenders Office he or she has one lawyer, and the lawyer  
22 works from beginning to end.

23           With our office and our caseloads being what they  
24 are, we're not able to practice vertical representation, we  
25 have to practice horizontal representation, which is a



1 lawyer is assigned to a court and any case that comes  
2 through that court they handle for as long as that case is  
3 in the court. It is a terrible way. It is maybe the  
4 biggest, the greatest single mistake that I've made as  
5 Public Defender, is to allow a practice of horizontal  
6 representation to take place. It is a major obstacle in  
7 allowing attorneys to form relationships with clients. The  
8 client is only passing through. The client realizes that  
9 and the lawyer realizes that, and it affects the quality of  
10 representation that lawyers are able to provide.

11 Q Have you ever tried to institute vertical  
12 representation?

13 A On a number of occasions, Scott Carpenter  
14 and I have sat down and brainstormed a method. We met with  
15 the District Attorneys Office to see if there was some  
16 method of going through and developing some partial vertical  
17 representation, but we've never had enough lawyers and we've  
18 always had too many cases and too many courts to cover for  
19 us to be able to do that.

20 Pat Leonard told me that his average caseload for

21 the last six months in Felony Sessions Court has been 16  
22 cases per day, average cases. If he has 16 cases in Felony  
23 Sessions Court he couldn't be anywhere but down in Sessions  
24 Court. He couldn't be handling anything else. He can't  
25 handle 16 a day, would be my opinion, as hard as he tries.

1                   Q           Are you familiar with the ABA Standards  
2 For Defense Function?

3                   A           I am.

4                   Q           We'll ask Ms. Williams to put that board  
5 up.

6                               MS. WILLIAMS: (Complies.)

7                               MR. BAHNER: We will want to introduce  
8 this, may it please the Court.

9 BY MR. BAHNER:

10                  Q           Without reading those into the record, in  
11 your experience, Mr. Stephens, how important are those  
12 standards for lawyers in the Public Defenders Office?

13                  A           Those are standards that lawyers should  
14 in each and every case maintain once they engage in the  
15 representation of an individual accused of a crime.

16                  Q           Are your lawyers able to do that?

17                  A           No, sir.

18                  Q           If Lawyer A is assigned to represent John  
19 Doe in General Sessions Court Misdemeanor Division and that  
20 case is for any reason passed, will that same lawyer

21 represent Client A if the case comes up for trial again,  
22 commonly, or not?

23           A           He might. The courts are aware of the  
24 impact on the police departments and officers having to  
25 appear in court, and so the courts will take into

1 consideration the officer's schedule, and oftentimes the  
2 officer's schedule doesn't coincide with the lawyer's  
3 schedule, and so when cases get reassigned oftentimes cases  
4 go to other lawyers' dockets. There have been cases--I've  
5 reviewed files in my offices where a single client has been  
6 represented by seven different lawyers in my office; just  
7 keeps getting passed off.

8 Q What's the effect of this on--

9 JUDGE EMERY: That's the exception in the  
10 rule, though?

11 MR. STEPHENS: That's the exception.  
12 Seven would be the exception. I would say two would be the  
13 rule.

14 JUDGE EMERY: And you concede that the  
15 judges try their best to try to keep on your schedules. We  
16 are--

17 MR. STEPHENS: --that you do.

18 JUDGE EMERY: --well aware of your  
19 schedules. Okay.

20 BY MR. BAHNER:

21                   Q               If a person is incarcerated when that  
22 happens, what happens to that person when the case has to be  
23 passed?

24                   A               The person stays in jail.

25                   Q               And how long does that typically occur?

1           A           These courts are very aware of  
2 individuals who are in custody and go to great lengths to  
3 get people out of jail if possible. If the threat to  
4 society can be controlled, these courts, these judges, try  
5 to get people out. And so if the State is not able to go  
6 forward these courts often--these judges often provide the  
7 remedy of releasing on some sort of supervised release that  
8 assures the safety of the community and gets the individual  
9 out of jail. But the circumstances being what they are,  
10 there are certainly people who wind up staying in jail  
11 because of the inability of our office, and oftentimes they  
12 contribute to the problem, but there are circumstances that  
13 result in people staying in jail longer.

14                   MR. BAHNER: We would like to have this  
15 made an exhibit.

16                   (Whereupon, the above referenced document was  
17 introduced as Exhibit No. 3.)

18 BY MR. BAHNER:

19           Q           Are you familiar with the ten principles  
20 of public defense?

21                   A            I am.

22                   Q            Are they reflected on this board which  
23 Ms. Williams has just put up?

24                   A            They are.

25                   Q            Let me direct your attention to the



1 second principle. What is that principle?

2           A           "Where the caseload is sufficiently high,  
3 the public defense delivery system consists of both a  
4 defender office and the active participation of the private  
5 bar."

6           Q           What do you understand that to mean?

7           A           Well--and it's one of the sad side  
8 effects, I think, in public defender offices. Growing up in  
9 Knoxville, professionally growing up in Knoxville, Knoxville  
10 I think has--had a great collection of tremendous private  
11 practitioners, some of the best, I think, in the  
12 southeastern part of the United States. I always wondered  
13 why the Memphis bar--and I don't mean to disrespect them,  
14 but I always felt the Memphis bar was not at the same level  
15 as the Knoxville bar. And, quite frankly, I always thought  
16 the Nashville bar wasn't quite to the same level, from a  
17 criminal defense standpoint, as the Knoxville bar.

18                       In my view, the Knoxville bar was  
19 certainly the best criminal defense bar in the state. I  
20 think now I know why. The Memphis Public Defenders Office

21 was created in 1917. I think it's the second oldest public  
22 defenders office in the country. The Davidson County Public  
23 Defender Office was created in 1960. It's a very, very old  
24 public defender office.

25                   And I think what we're seeing in Knox County, after

1 18 years of a public defender office, the private bar can't  
2 sustain a practice--enough lawyers can't sustain an  
3 appointed practice, and I think what you see is the gradual  
4 weeding out, so to speak, of quality lawyers who are forced  
5 because there's lack of adequate available cases--they move  
6 on to something else. And I think what we're seeing is the  
7 Knoxville bar's strength in terms of the number and  
8 certainly the quality because the Public Defender Office  
9 consumes such a large percentage of the cases.

10 Q Let me direct your attention to Principle  
11 No. 4. Will you read that, please.

12 A "Defense counsel is provided sufficient  
13 time and a confidential space within which to meet with the  
14 client."

15 Q Do you have sufficient time to meet with  
16 clients?

17 A No, sir.

18 Q Is 30 minutes something that is  
19 consistently done, or are there many times when you cannot  
20 spend 30 minutes with a client?

21                   A                   Well, let me tell you, clients who make  
22   bond, appear at bond and arraignment and they're told to  
23   call the Public Defenders Office, when they call, the  
24   switchboard operator will ask them two or three questions  
25   which will immediately tell her who to assign that case to.

1 They'll ask the client, What are you charged with? When the  
2 client answers, A misdemeanor, or the client tells them the  
3 offense and the switchboard operator knows it's a  
4 misdemeanor, then they'll ask them what date that their  
5 court date is, they'll know which lawyer is assigned in  
6 Misdemeanor Court on that date. Then we divide the alphabet  
7 so that one lawyer takes the first half of the alphabet and  
8 another lawyer takes the second half of the alphabet. So  
9 the switchboard operator, in just a couple of questions, can  
10 immediately tell who is going to handle that case, and then  
11 they'll send the caller to the individual secretary who will  
12 then schedule an appointment.

13           So the scheduling is done by the secretary in  
14 30-minute intervals. Many of my lawyers don't know what--so  
15 I'll schedule interviews for every 30-minute intervals for  
16 every day to prep that I have in order to get appointments  
17 scheduled. I will tell you I am aware, and Ms. Williams can  
18 testify, that there have been clients call in and ask for an  
19 appointment and they have been told there aren't any slots  
20 left, every 30-minute interval has been double-booked with

21 the entire prep week, you can't see your lawyer.

22 Q Now, quite apart from the in-client  
23 interview, is investigation frequently required?

24 A Yes.

25 Q How do you and your lawyers handle

1 getting investigation done?

2           A           Well, we have four investigators, and  
3 this year we'll handle 11,500 cases, but that amounts to  
4 many more filings, and so there's a limit to what the four  
5 investigators can do. So the investigation is not done in  
6 many cases, just not done.

7           Q           Have you worked as a District Attorney?

8           A           I have.

9           Q           And compare the work of a District  
10 Attorney with the work as Public Defender.

11          A           When I was in the District Attorneys  
12 Office, and that's been many years ago, the mid '80s, I was  
13 assigned to both Division II at one period of time, and I  
14 was assigned to Division III, and what typically happens  
15 when--and this Court knows when crime occurs police officers  
16 respond to that crime scene, they are trained in securing  
17 the crime scene. They are trained at collecting all the  
18 evidence, taking the photographs, seeing to it that the  
19 evidence is sent off to the appropriate crime labs,  
20 requesting that the appropriate crime labs conduct forensic

21 testing on the evidence. They're very good at acknowledging  
22 and identifying the witnesses. They secure those witnesses.  
23 They take them to the police station. They interview those  
24 witnesses. They oftentimes videotape those interviews.  
25 They hand the videotape and the cassette tape to their



1 secretary, who then transcribes the interviews. That  
2 information is what a prosecutor needs to put his or her  
3 case together, and much of it is supplied by a combination  
4 of the KPD, the Knox County Sheriffs Department, the TBI,  
5 the FBI, and I understand the D.A.'s office is currently  
6 using a New Jersey forensic crime lab right now in one of  
7 the cases they've gotten. So they have--and this isn't to  
8 criticize them, but they have access to police agencies that  
9 do a tremendous amount of leg work to prepare cases for the  
10 prosecutor.

11           When I was in the prosecutor's office, I--this is  
12 arbitrary, I acknowledge, but when I got a file I felt like  
13 the case was about 60 to 70 percent ready for trial. Now,  
14 there's certainly work a prosecutor has to do, and  
15 oftentimes when the prosecutor gets into the file they  
16 realize there's additional work that needs to be done, but  
17 they can always pick up the phone and call KPD and say, I  
18 need to talk to the detective in charge, here's the  
19 additional work that needs to be done, and those detectives  
20 respond. And so it's not that they don't have to do

21 anything, but the quantity of work the prosecutor has to do  
22 is nowhere the quantity of work the defense lawyer has to  
23 do.

24 Q Let me direct your attention to Principle  
25 No. 5. Will you read that, please.

1           A           "Defense counsel's workload is controlled  
2 to permit the rendering of quality representation."

3           Q           Can you do that?

4           A           No, sir--well, I'm trying. We'll see.

5           Q           Well, in your opinion, are your lawyers  
6 consistently able to do that?

7           A           No, sir. There is a phenomenon across  
8 the country that many states have that's called "declaring  
9 unavailable." Lots of public defender offices have the  
10 ability to simply notify the court and declare themselves  
11 unavailable for appointment. It doesn't require a hearing.  
12 It doesn't require--the public defender is an officer of the  
13 court, and in many states they trust the public defender to  
14 acknowledge when he or she can ethically take cases, but  
15 they also acknowledge when he or she can't. And so some  
16 state public defenders have a luxury of declaring themselves  
17 unavailable. My office and the Tennessee Public Defender  
18 System is not set up that way.

19          Q           What is Principle No. 7?

20          A           "The same attorney continuously

21 represents the client until completion of the case." That

22 is--

23           Q           That's vertical representation?

24           A           Yes, sir.

25           Q           And No. 8?

1           A           "There is parity between defense counsel  
2 and the prosecution with respect to resources, and defense  
3 counsel is included as an equal partner in the justice  
4 system."

5                       MR. BAHNER: We would like to have this  
6 board marked as the next exhibit, may it please the Court.

7           (Whereupon, the above referenced document was  
8 introduced as Exhibit No. 4.)

9 BY MR. BAHNER:

10           Q           I want to touch on a few things in  
11 conclusion. When the caseloads in the fiscal year 2007 are  
12 broken down per attorney, generally what were those  
13 caseloads per lawyer in the Public Defenders Office?

14           A           We opened 13,259 cases in fiscal year  
15 2007. At various times of the year we have--I think we got  
16 as low as maybe 18 lawyers at one point. We got as high as  
17 maybe 22 lawyers at one point during that year. And so I  
18 don't know any way other than to take 13,259 and divide it  
19 by some number, maybe 20, to give you an average of cases  
20 per lawyer. It' runs around 550. My math's not great.

21                   Q               What were caseload figures for the first  
22 three quarters of the current fiscal year?

23                   A               Mr. Merkle ran those figures for us...

24                               MR. BAHNER: I'd like to hand one of  
25 these to each member of the Court, if I may.

1 JUDGE EMERY: Are those not included in--

2 MR. BAHNER: No, this is new.

3 MR. DIMOND: Excuse me, Your Honor. I  
4 don't have an objection, but I haven't gotten copies of any  
5 of these exhibits and I wondered if I might have copies.

6 JUDGE MCGEE: Certainly.

7 JUDGE EMERY: Yes.

8 MR. BAHNER: I don't have any more, I'm  
9 sorry, of this, but we'll get it to you later.

10 JUDGE EMERY: We can share. Do you need  
11 it?

12 MR. BAHNER: Here. I'll give it to him  
13 now. (Indicates.)

14 BY MR. BAHNER:

15 Q Okay.

16 A Mr. Bahner, I hope I'm responsive to  
17 your question. But as of May 1st of 2008, we had 268 open  
18 cases in Division I. We had 212 open cases in Division II;  
19 247 open in Division III. We had 549 open cases in DUI  
20 Court. We had 750 open felony cases. We had 1,460 open

21 misdemeanor cases, and we had 357 open juvenile cases, as  
22 far as we can tell.

23           Q           Now, are those ongoing cases?

24           A           Those are ongoing cases, yes, sir.

25           Q           Do these numbers reflect cases which were



1 opened but disposed of?

2 A No, sir. These are cases that are still  
3 open. We are currently engaged in the representation of  
4 these individuals.

5 MR. BAHNER: We would like to make this  
6 the next exhibit, which I believe is Exhibit No. 5.

7 (Whereupon, the above referenced document was  
8 introduced as Exhibit No. 5.)

9 JUDGE CERNY: The court officer is  
10 bringing in some additional copies to share with Mr. Dimond.

11 MR. BAHNER: I'm sorry we didn't bring  
12 enough.

13 BY MR. BAHNER:

14 Q Mr. Stephens, in your opinion, as the  
15 elected Public Defender, are the lawyers in your office able  
16 to consistently meet the ethical obligations of Rule 8?

17 A No, sir.

18 Q Why?

19 A Too many cases. It's not possible.

20 Q Are they able to render, consistently,

21 across the board, effective assistance of counsel to the  
22 people appointed to your office who are charged with a  
23 crime?

24           A           Mr. Bahner, if effective assistance--if a  
25 prospective analysis includes me testifying under oath that

1 my lawyers will meet their ethical obligations to their new  
2 clients, I would say no, they would not render effective  
3 assistance of counsel because they will not meet their  
4 ethical obligations to their existing clients or to future  
5 clients. They will not be able to do that. They are not  
6 currently doing that.

7 Q In your view, what are the constitutional  
8 issues which are the foundation for the public defender  
9 lawyers' work in representing an indigent person charged  
10 with a crime?

11 A A client has the right to a lawyer, and  
12 that lawyer should perform reasonably effective--should  
13 provide reasonably effective service. That's the standard,  
14 as I understand it. And to assure that a client receives  
15 reasonably effective assistance of counsel, one must assume  
16 that all of the requirements that the ABA Defense Functions  
17 set out are completed as it relates to each individual  
18 client, and that's not being done.

19 My conclusion from that is, if you cannot do that,  
20 try as you might, if you cannot meet the ABA Standards for

21 Defense Function and you cannot comply with Rule 1.1 and  
22 1.3, you cannot at any stretch maintain that you're  
23 providing reasonably effective assistance of counsel.

24 Q Are you all able to meet the promise of  
25 Gideon?

1           A           No, sir. Every single day I look--well,  
2 every single day I look at a picture of Clarence Gideon on  
3 my wall and am moved by how this man, this 50-year-old  
4 drifter, changed American jurisprudence. And the  
5 realization, as Steve Grime (phonetic) says, never in the  
6 history of the law, as he understands it, has such a life  
7 been afforded so much lip service but in reality is a sham.  
8 And, to me, it is shameful that I have allowed my office to  
9 get into the situation that we're in, in terms of caseloads,  
10 whether it's 15,000 cases; 13,000 cases; 11,570 or 11 cases.  
11 I don't care what it is; our current caseload prohibits my  
12 lawyers from being able to provide reasonably effective  
13 assistance of counsel though they try as hard as they can  
14 try.

15           Q           Thank you. Is there anything else you  
16 would like to say, Mr. Stephens, that I haven't asked you?

17           A           I don't think so. Thank you.

18           Q           Thank you.

19                   JUDGE EMERY: Are there any questions  
20 anyone wants to direct to the Public Defender at this time?

21 JUDGE JACKSON: Mr. Stephens, would it be  
22 better to wait and address Mr. Merkle or yourself about how  
23 some of these numbers are arrived at? Do you know?

24 MR. STEPHENS: Mr. Merkle is available  
25 and he will--

1                   MR. BAHNER: He's the next witness.

2                   MR. STEPHENS: He's probably better  
3 suited to explain that.

4                   (Off the record discussion.)

5                   JUDGE EMERY: Let me ask one question.  
6 And I mentioned this to you the other day, and we're getting  
7 ready to get into this with the testimony of your technology  
8 guy here. As far as cases where you decide you do have a  
9 conflict, after looking into it, for case count purposes  
10 when you get off a case, when you ask to be relieved, you  
11 told me you divided that up into a--that it was done in a  
12 certain number of days or after--I realize sometimes you  
13 know immediately that you have a conflict and other times  
14 you have to do some work before you decide whether or not  
15 you have a conflict.

16                  MR. STEPHENS: Right. What we've done is  
17 we have figured out the number of hours that a lawyer has to  
18 spend on a given case. We have about 1.7 hours per DUI  
19 case. We have about 1.9 hours to spend on a misdemeanor  
20 case. We have about two and a half hours to spend on each

21 felony case in Sessions Court.

22               What we have done is we have determined that if a  
23 conflict exists in our representation and we discover that  
24 conflict within five days, we are assuming that that case  
25 did not require a tremendous outlay of services from our



1 office and we do not count it as a case.

2           If we have represented an individual for longer  
3 than five days and then ultimately have to conflict off of  
4 that case, we do count it as a part of our statistical base.  
5 And Isaac will talk more in a moment about that. It's an  
6 arbitrary figure. We figure that within three days we hope  
7 the lawyer will be out to the detention facility. So  
8 there's efforts involved, both secretarial and from the  
9 lawyers' staff, involving that case, and so if that happened  
10 we're going to count it as a case. If it hasn't happened  
11 we're not going to count it as a case.

12           JUDGE EMERY: Okay. Thank you.

13           JUDGE JACKSON: What if they're not in  
14 jail? It may be two, three weeks, a month, before you  
15 interview them.

16           MR. STEPHENS: It could be. One of the  
17 practices--we don't schedule interviews until a week before,  
18 because we don't have--the week before their court date,  
19 because we don't have any time to do that. But the conflict  
20 is picked up at the time the case is entered into the

21 system, and the case is entered into the system the next  
22 day.

23 JUDGE JACKSON: That's when you would--

24 MR. STEPHENS: What will happen--

25 (Off the record discussions held simultaneously.)

1                   MR. STEPHENS: What happens when a case  
2 comes in through JIMS, the secretaries enter it into the  
3 case management system. If they hit a conflict  
4 they'll prepare a memo and they'll get it to the lawyer  
5 almost immediately. The lawyer has to make the decision  
6 whether to conflict or not, but that decision will almost  
7 always be made on the spot. Now, oftentimes the lawyer will  
8 say, I can't tell, I'll have to do more work, so I'll have  
9 to go do an interview to determine whether there's a  
10 conflict or not, or I need more information, so that's the  
11 delay.

12                  JUDGE JACKSON: Thank you.

13                  JUDGE MCGEE: You explained the  
14 difference between caseload and workload, and I understand  
15 that. The figures you've given us, like 550 cases per  
16 attorney, is roughly what your attorneys are experiencing.  
17 Is that under the State's definition, or is that your  
18 workload definition?

19                  MR. STEPHENS: That's caseload  
20 definition. Workload is much higher than that.

21 JUDGE MCGEE: Okay.

22 MR. STEPHENS: And I will say, and this  
23 is not to drive a wedge between fellow public defenders, but  
24 if you'll look at the caseload statistic per lawyer in  
25 Memphis it runs around 330 cases per lawyer. If you look at

1 Nashville it runs around 400, 420 cases per lawyer. If you  
2 look at Chattanooga it runs about 520 cases per lawyer. We  
3 are, by far, the highest of any of the four metropolitan  
4 areas in the state.

5 The mistake that we made was creating the  
6 office in 1990 and assigning seven lawyers to the staff.  
7 We've been behind the curve since then--

8 (Interruption in the proceedings.)

9 MR. STEPHENS: --chase staffing since the  
10 time we were created. That was the problem.

11 JUDGE MCGEE: Do you maintain a record, a  
12 stat, of your workload figures, as opposed to caseload  
13 figures?

14 MR. STEPHENS: We think that the filing  
15 figures more accurately reflect workload than the cases, so  
16 we maintain filing figures and we maintain case figures.

17 JUDGE MCGEE: That's what I was curious  
18 about. You know, we all know that one spree can involve  
19 seven different victims, seven different factual scenarios,  
20 and the State lumps it all together as one case. We also

21 know that there are cases where a person may get stopped for  
22 running a red light and wind up being charged with DUI and  
23 six other driving-related offenses. That wouldn't translate  
24 into seven times the workload.

25 MR. STEPHENS: You're right.

1 JUDGE MCGEE: Do you take that into  
2 account somehow in assessing your--

3 MR. STEPHENS: No, sir.

4 JUDGE MCGEE: Okay.

5 MR. STEPHENS: In theory, I guess, in a  
6 way, the caseload study does that on some level. I don't  
7 know that there is an effective way of measuring workload as  
8 it relates to individual files with an individual scenario.

9 JUDGE MCGEE: I haven't been able to  
10 figure out any way to do it.

11 JUDGE JACKSON: Mr. Stephens, you say  
12 that Chattanooga and Memphis and Nashville all have less  
13 cases per attorney. How is the allocation made across the  
14 state of public defenders? Is it not based upon how many  
15 cases you handle?

16 MR. STEPHENS: What happens now is the  
17 positions are awarded to the conference and then the  
18 conference votes on how to assign those positions.

19 JUDGE JACKSON: It's not based on  
20 caseload, at all?

21 MR. STEPHENS: No, it is based on  
22 caseload, sure.

23 JUDGE MCGEE: Why didn't you get any  
24 lawyers last time around?

25 MR. STEPHENS: Maybe it's my personality.



1 I'm not quite sure.

2 JUDGE EMERY: All right. Ten-minute  
3 break.

4 (Recess was taken.)

5 MR. MOORE: Our next witness is Mr. Isaac  
6 Merkle.

7 JUDGE EMERY: Okay.

8 MR. MOORE: May it please the Court, I'm  
9 Hugh Moore of the Chattanooga law firm of Chambliss, Bahner  
10 & Stophel.

11 EXAMINATION

12 BY MR. MOORE:

13 Q Mr. Merkle, would you state your name for  
14 the record. You've already been sworn; is that right?

15 A Yes, sir.

16 JUDGE EMERY: Yes.

17 BY MR. MOORE:

18 Q Okay. Would you state your name for the  
19 record.

20 A My name is Isaac Merkle.

21 JUDGE CERNY: Mr. Merkle, please grab the  
22 microphone and pull--

23 JUDGE EMERY: Yes, pull that a little bit  
24 closer to you.

25 JUDGE CERNY: Thank you.

1                   A           My name is Isaac Merkle.

2   BY MR. MOORE:

3                   Q           And speak up. Judge Cerny said there's a  
4   dead spot in the courtroom, so speak up.

5                   A           All right.

6                   Q           And you're presently the IT Director for  
7   the Knox County Public Defenders Office; is that right?

8                   A           Yes, sir, that's correct.

9                   Q           And what formal educational background do  
10   you have?

11                  A           Well, I have a high school diploma, and I  
12   went to a community college for three semesters before I  
13   moved on to seek employment. But my real education came in  
14   the form of an apprenticeship to my predecessor as IT  
15   Director at the Public Defenders Office.

16                  Q           And you have been at the Public Defenders  
17   Office for what, 12 years?

18                  A           For 12 years.

19                  Q           And for how much of that time have you  
20   been in IT work?

21                   A           For 11 years.

22                   Q           Okay. And you apprenticed under the  
23 previous director there?

24                   A           Yes, sir, that's right.

25                   Q           Whose name was...

1                    A                    Daryl Young.

2 Q Okay. And you worked with him for  
3 approximately a year, and then you took over the job?

4                   A                   That's correct. He was phased out and I  
5 was judged to be competent and able to take care of things.

6 Q Okay. And then so for more than a  
7 year--for more than a decade you've been the primary  
8 software IT person for the Knox County Public Defenders  
9 Office?

10                   A            Yes, sir, that is correct.

11 Q Do you have other work experience in that  
12 area?

13           A           I've done freelance in IT consulting work  
14 both inside and outside the legal community here in  
15 Knoxville. I've also taught a couple of CLE classes, and  
16 I--

17 JUDGE EMERY: I don't mean to interrupt  
18 you, but can you stipulate these qualifications or not?

19 MR. MOORE: I think that would be fine.

20 JUDGE MCGEE: I think we're all prepared

21 to accept him as an expert in his field.

22 MR. MOORE: Okay. That was actually the  
23 end of the questioning so--

24 (Off the record discussions held simultaneously.)

25 MR. MOORE: And there are three charts

1 that Mr. Merkle has prepared, one of which has already been  
2 introduced as Exhibit 5. I think that's the last exhibit  
3 that was introduced. The other two--I guess I can just--I  
4 have copies I can pass out to the Court. It's 2007 and 2008  
5 statistical reports.

6 JUDGE EMERY: They can be found in the  
7 original sworn petition, but they are probably categorized  
8 better there.

9 MR. MOORE: Right. This is the 2007  
10 report, and I have one for the two thousand...

11 JUDGE CERNY: Would it be fair to say  
12 that these were already attached to the affidavit?

13 MR. MOORE: These two are. The 2007 and  
14 2008 reports are attached to the affidavit. Exhibit 5 was  
15 not.

16 JUDGE CERNY: Thank you. Okay.

17 (Off the record discussion.)

18 BY MR. MOORE:

19 Q Could you explain to the Court, briefly,  
20 how you generated the numbers that appear in these

21 documents--I guess we ought to number them.

22 MR. MOORE: The 2007 statistical report  
23 we would ask to be introduced as Exhibit 6. The 2008 report  
24 is Exhibit 7.

25 (Whereupon, the above referenced documents were



1 introduced as Exhibit Nos. 6 and 7, respectively.)

2 BY MR. MOORE:

3 Q Mr. Merkle, could you tell the members of  
4 the Court how you generated the numbers that appear in this  
5 report?

6 A Yes, sir. As previously alluded to by  
7 Mr. Stephens, our current case management system is old and  
8 somewhat cranky, but fortunately we do have the utility of  
9 this program by an author of that software, which has a  
10 purpose of exporting segments of the data bank that are  
11 pertinent to counting cases in terms of caseloads, and so I  
12 first use that utility to export portions of the database.

13 Q Okay. What's a utility?

14 A A utility is a small and relatively  
15 trivial piece of software.

16 Q Do you use that to manage the numbers?

17 A That utility's purpose is simply to take  
18 the fairly complex information structure of our case  
19 management system and extract it into a simple format  
20 containing only the information required to do this type of

21 analysis in specific. And having done that by the exporting  
22 process, I extract it. I then brought that into a general  
23 purpose database tool and used that tool to ask questions of  
24 the database, so to speak, data queries, which were aimed at  
25 generating a fiscal count of both charges and cases, open

1 and closed, over specific periods of time, specifically in  
2 the fiscal year 2007 and the first three quarters of this  
3 year, 2008.

4 Q And so you were able to generate these  
5 figures from statistics maintained in the database that you  
6 maintain at the Public Defenders Office here to generate  
7 these spreadsheets?

8 A Well, of course, what came out of the  
9 database was raw data which I then moved into a spreadsheet  
10 so I could format--

11 Q Using Excel format or--

12 A Correct.

13 Q Based on your knowledge and your  
14 experience there in the office, do the charts, that is,  
15 Exhibits 5, 6 and 7, accurately reflect the data that's  
16 maintained at the Public Defenders Office?

17 A Yes, sir, I believe they do.

18 Q Okay.

19 MR. MOORE: We would offer the charts,  
20 and obviously, I think the Court may have some questions of

21 Mr. Merkle. We would offer Exhibits 5, 6 and 7 into  
22 evidence. Those are all the questions that I have.

23 JUDGE EMERY: Anybody have questions?

24 JUDGE JACKSON: Let me ask you, Mr.

25 Merkle, on open cases, how are cases that are disposed of;

1   pled guilty, then they're coming back on the docket for  
2   return check-back -- are those still treated as open,  
3   pending cases, or are those taken off the open case?

4                   MR. MERKLE:  I believe those are no  
5   longer regarded as open in our system.

6                   JUDGE EMERY:  Once the disposition takes  
7   place, that's--

8                   MR. MERKLE:  If you don't have to come  
9   back to court the case is then disposed of, and it will be  
10  marked status closed in our system, and that--

11                   (Interruption in the proceedings.)

12                   MR. MERKLE:  --closed status I use a  
13   filter in order to create these statistics, so only those  
14   cases with a status of open or closed--

15                   JUDGE JACKSON:  Okay.  Now, how about if  
16   a person is charged...some people are charged with  
17   violations of probation.

18                   MR. MERKLE:  Yes, Your Honor.  Probations  
19   are accounted statistics.  Probation revocation hearings, I  
20   should say.

21 JUDGE EMERY: Now, would those remain  
22 open as long as the violation of probation is pending  
23 against them?

24 MR. MERKLE: The way we work our system  
25 is the initial charge that resulted in probation would be

1 disposed of, but then if they have violated their probation,  
2 then we will open a new case in the system which has the  
3 type of probation revocation. And so that's a secondary  
4 case, so then we count it, as well. And it's my  
5 understanding, based on the statute, that is the appropriate  
6 way for us to do that.

7 JUDGE JACKSON: How about informations?  
8 How are those treated, where a person--when your assistants  
9 take the case from Felony Court--it's usually Felony Court,  
10 it could be DUI Court, I guess...from Felony Court to  
11 Criminal Court? Would that be treated as a new, open case  
12 in that division of Criminal Court?

13 MR. MERKLE: I apologize. Are you  
14 speaking of a bindover or--

15 JUDGE JACKSON: Well, it's bound over but  
16 it's resolved already. It's bound over--

17 (Interruption in the proceedings.)

18 MR. MERKLE: --essentially a felony in  
19 Criminal Court, and my understanding is that the assistant  
20 in Criminal Court would not handle that, the assistant in

21 Sessions Court would continue to handle that.

22 MR. MERKLE: I'm not qualified to say  
23 about that. I'm sorry. I don't know.

24 With respect to our case management  
25 system, however, I can say, frustratingly, it did not



1 accommodate a specific piece of information as to whether or  
2 not a particular case is in information or is not in  
3 information--

4 JUDGE JACKSON: You just treat it as an  
5 open case in Criminal Court?

6 MR. MERKLE: I believe it is, sir.

7 JUDGE JACKSON: Once it comes into  
8 Criminal Court as a new case in Criminal Court, you would  
9 treat it as a new one--

10 MR. MERKLE: What I--

11 JUDGE JACKSON: Like any other  
12 boundover?

13 MR. MERKLE: --I can't see any difference  
14 in the database when something is in information or it  
15 isn't, so the question would be how the secretary enters it  
16 into the system. It's my belief that those informations are  
17 entered, but I may be mistaken about that.

18 JUDGE JACKSON: And I also wondered about  
19 the--you may not know, but lots of times a felony case  
20 that's going to be pled by information will have a number of

21 misdemeanors attached to it that will be dismissed in  
22 Criminal Court as a result of their plea. I don't know if  
23 those are treated as new cases or...I don't know how that's  
24 handled. I don't know if they get a Criminal Court docket  
25 number or not. They're bound over--

1                   MR. MERKLE: I can't answer that specific  
2 question, but I can certainly find out the answer. But I  
3 don't know the answer right now.

4                   JUDGE JACKSON: I understand. Thank you.

5                   JUDGE STANSBERRY: Mr. Merkle, I have a  
6 question. When a public defender discovers a conflict in  
7 Sessions Court and they go forward and try to represent  
8 their client but they tell their client, because of Mr.  
9 Stephens' directive, that they can't meet with them that day  
10 and handle the case that day, so that client will waive  
11 their right to have a court appointed counsel proceed, but  
12 the PD, nevertheless, to their credit, goes and communicates  
13 an offer from the State; how could a conflict case like  
14 that--or where one of the public defender's clients waives  
15 their right to have an attorney but that attorney does the  
16 work anyway, how is that recorded on your IT stats?

17                   MR. MERKLE: I'm sorry, I don't have a  
18 familiarity with the situation you're describing. The only  
19 answer I think I can give you is what Mr. Stephens said  
20 earlier, which is that the secretary, when they enter a

21 conflict into our case management system, that's considered  
22 a disposition. From our standpoint that's a disposition  
23 because we're not handling that case, and so we then have a  
24 date on which we were conflicted off it, and we use that  
25 date to determine whether or not we're going to take credit,

1 so to speak, for caseload counting.

2 JUDGE JACKSON: Judge Stansberry is  
3 probably talking actual conflict. It's actually when the  
4 Public Defenders Office withdraws from the case.

5 MR. MERKLE: Oh, I'm sorry. If we  
6 withdraw we do not count those.

7 JUDGE JACKSON: Do you not count those at  
8 all?

9 MR. MERKLE: No, Your Honor, we do not.  
10 There are several dispositions I was instructed not to  
11 include in these counts, and that's one of the dispositions  
12 I excluded from these counts.

13 JUDGE JACKSON: So in that case they  
14 maybe do the work but not get the credit for it?

15 MR. MERKLE: That's correct, sir.  
16 Whenever we have the opportunity to assign, in overcounting,  
17 potentially, or undercounting, potentially, we show it as  
18 undercounts, trying to be as conservative as we can. We  
19 certainly don't want to be responsible for even some  
20 overcounts.

21 JUDGE EMERY: And that's true regardless  
22 of what stage (inaudible) when that's done?

23 MR. MERKLE: Yes, Your Honor. That's  
24 right.

25 JUDGE EMERY: On your 2008, fiscal year

1 2008 statistical report, you of course had figures, I guess,  
2 from the County's IT Department as to cases opened through  
3 the first nine months of the year, and I read your  
4 methodology there, where you went back and averaged I think  
5 three years and saw how much that was--in trying to figure  
6 out--we know what three-fourths of the year caseload is,  
7 what is one year going to be? And you went back, looks like  
8 very thoroughly, and you went through like three or four  
9 years, prior years, to see--January--month by month to see  
10 what that weighted caseload would be in those last three  
11 months. You came up with a multiplier of 1.34 on those.

12 MR. MERKLE: That's correct.

13 JUDGE EMERY: And I multiplied those  
14 numbers to get what your caseloads would be as of the end of  
15 fiscal year '08. I just checked for them for Sessions  
16 Court, and that would be roughly forty-three oh three for  
17 misdemeanors, cases; fifteen twenty-four for DUI; and  
18 thirty-two twenty-seven--or thirty-seven for felony. Do you  
19 know if that is accurate or not?

20 MR. MERKLE: I apologize. I haven't done

21 that--or I haven't brought it with me, but it sounds  
22 ballpark correct to me off the top of my head.

23 JUDGE EMERY: Does anyone else have any  
24 questions of Mr. Merkle?

25 MR. MOORE: We have no further questions



1 of Mr. Merkle.

2 MR. LOVE: Your Honors, may it please the  
3 Court, my name is Aaron Love. We'd like to call Jamie  
4 Poston.

5 EXAMINATION

6 BY MR. LOVE:

7 Q Ms. Poston, please state your name for  
8 the record.

9 A Jamie Poston.

10 Q What is your educational background?

11 A I did undergrad at Vanderbilt University  
12 and graduated in 2004. I went to the University of  
13 Tennessee Law School and graduated in 2007 and passed the  
14 bar in October, October 19, 2007.

15 Q What is your current position of  
16 employment?

17 A I'm Assistant Public Defender. I work in  
18 General Sessions Court in Misdemeanor Division.

19 Q Have you ever worked in any other courts  
20 besides the Misdemeanor Division?

21                   A               No, just Misdemeanor.

22                   Q               While you were at the University of  
23 Tennessee, did you participate in the legal clinic?

24                   A               Yes. I did that after my second year.

25 Right before my third year of law school I did the summer

1 program. It's a little smaller and less people, and we  
2 worked directly with Jerry Black.

3 Q In connection with your experience in the  
4 legal clinic, did Professor Black teach you the steps that  
5 are required to prepare a criminal case?

6 A Yes. Before we even were able to meet  
7 with a client, we had a meeting where (inaudible) a pamphlet  
8 of everything we needed to do on a case. Even now, looking  
9 at the ABA standards, I believe it was modeled, not  
10 directly--looks like it was indirectly modeled after the ABA  
11 standards of everything that we needed to do, and we went  
12 over it with them several times.

13 Q When you say "ABA standards," you're  
14 talking about the ABA Standards for the Defense Function  
15 that Mr. Stephens testified to earlier?

16 A Yes. Those we were talking about today.

17 Q Would you please describe for the Court  
18 those steps that you were taught to take in preparing a  
19 criminal case.

20 A We usually--I guess I'll go through with

21 the example of what we did with each client. We would

22 identify--

23 Q What type of clients were you

24 representing?

25 A When I was there, we did juvenile defense

1 a lot, a little bit of landlord/tenant, but I primarily did  
2 juvenile defendants. Usually what we would do for him is  
3 we'd do a little bit of research into what the client was  
4 charged with, sort of the issues around that, a little bit  
5 of legal research into the basics that we saw from the  
6 initial case before we looked at it. We would meet with the  
7 client usually several times, three or four times. We'd  
8 look at all the witnesses that we needed that were relevant  
9 to the case, any sort of background, medical records, school  
10 records that might be relevant to the case that we'd look  
11 into, requests, etcetera, etcetera.

12 I talked with a lot of the family members of the  
13 clients or friends that were involved. And we would do a  
14 very thorough investigation. And then usually I would meet  
15 with the client probation officer separately and the D.A.  
16 separately, before I even went into court.

17 Q Were you able to interview other fact  
18 witnesses besides your client?

19 A Yes. I think that on one case I can  
20 remember interviewing two or three people, two or three

21 friends that were involved. There was a client-no-insurance  
22 issue that I had to interview the parents. Basically,  
23 anyone that was involved that I could get ahold of I  
24 interviewed.

25                   Q                   Can you estimate how much time you've

1 spent on a case on average?

2           A           For just the typical juvenile defense  
3 case it's hard to estimate for sure, but I would say 10, 12  
4 hours, and that's kind of billing time, I guess; you know,  
5 not the driving or just...just talking with people and doing  
6 research added all up.

7           Q           As a public defender now, are you able to  
8 perform all these steps that you were able to do in the  
9 legal clinic?

10          A           No. No, not at all.

11          Q           What are you able to do in preparing your  
12 cases?

13          A           Interview them. My office is very,  
14 very--it's very hectic. For example, tomorrow I have 13  
15 people scheduled for interviews back to back, half-hour  
16 slots from nine to five. If a client doesn't show up I'll  
17 use that time to look at the other cases that are set for  
18 the docket next week, go through them, look at what I need  
19 to do. You know, basically I'm just trying to fill in what  
20 I can, basically. Most of my week is usually filled up with

21 interviews.

22 Q How long are those interviews?

23 A Half an hour.

24 Q Are you able to interview witnesses  
25 besides your clients?



1                   A           Very rarely.

2                   Q           Are you able to conduct any other factual  
3 investigation into the case?

4                   A           Very rarely. You have to remember that  
5 of those 12 or 13 I'm usually kind of making a snap judgment  
6 about them when they come in. You know, some of it's  
7 whether I like them, whether I think they have a really good  
8 case, whether something connects me with them. So they  
9 might get a little bit more effort from those cases, but I  
10 just don't have time to do--interview every single witness  
11 and do every single factual investigation of every client  
12 that comes in the door.

13                  Q           Would you say that your caseload creates  
14 conflicts for you among some clients and their cases?

15                  A           Yes. I think--especially when I'm in  
16 court, I'll have--for example, I had, I think, 26 people on  
17 the docket last Wednesday. Of those 26 I had, I think, 16  
18 that were unresolved. Eleven of those were set for hearing.  
19 And I think I was really ready and prepared and competent to  
20 do about three of those hearings, which obviously, makes it

21 very uncomfortable when I have that many people in the  
22 courtroom all vying for my attention, and I just can't do  
23 them all.

24           Q           You said you had 13 interviews set for  
25 tomorrow; is that correct?

1           A           Yes.

2           Q           Are you always able to interview all your  
3 clients in the week before their cases are set?

4           A           No.

5           Q           What happens if you're not able to  
6 interview a particular client?

7           A           If I'm not able to interview them I meet  
8 them in court, and I--if I haven't been able to interview  
9 them I'm not prepared to go forward and we need to reset for  
10 another date.

11          Q           In your view, what are the essential  
12 things that you must do in handling your client's case that  
13 you're not able to do handling your caseload?

14          A           I think the worst part is the  
15 investigation. I can remember during clinic sometimes the  
16 investigation wouldn't help me, you know, wouldn't help my  
17 case, but at least I knew. At least I had more knowledge.  
18 You know, my clinic clients I knew, you know, their grades,  
19 how many credits they needed to graduate. I knew everything  
20 that I could possibly know. I knew how their family

21 structure was, what books they read; anything that I could  
22 use to help their case I knew. I don't know that. I just  
23 go with what they tell me during an interview kind of hoping  
24 that it works out for me in court.

25                   Q                   Ms. Poston, are you familiar with the

1 Tennessee Rules of Professional Conduct?

2 A Yes, sir.

3 Q Are you familiar with the constitutional  
4 standard for the effective assistance of counsel?

5 A Yes, I am.

6 Q And you have testified that you are  
7 familiar with the ABA Standards For Criminal Justice Defense  
8 Function?

9 A Yes.

10 Q What is your opinion of your ability to  
11 meet those standards under your current caseload?

12 A You know, I don't think it's really a  
13 yes or no question. You know, I work very hard. I bring  
14 stuff home. I'm working on weekends. I really wanted to do  
15 this. I wanted to be a public defender. But, you know,  
16 there hasn't been a time that I haven't left court where I  
17 haven't felt guilty about someone that I think I could have  
18 done more on their case.

19 You know, I'm working really hard to kind of stay  
20 above water, and when it comes down to it there are more

21 cases that are being opened and being closed every month,  
22 and the water level just keeps rising. So I don't think  
23 that I can really say that I'm doing what I should be doing.

24 Q Thank you, Ms. Poston. I have nothing  
25 further.

1 JUDGE EMERY: Questions of this witness?

2 (No response.)

3 JUDGE EMERY: Thank you.

4 MS. POSTON: Thank you.

5 MR. LOVE: Your Honors, we call Christy  
6 Murray next.

7 EXAMINATION

8 BY MR. LOVE:

9 Q Ms. Murray, would you state your name for  
10 the record, please.

11 A My name is Christy Murray.

12 Q Ms. Murray, what is your educational  
13 background?

14 A I graduated, got my undergraduate in  
15 philosophy from East Tennessee State University. I then  
16 graduated from the University of Tennessee School of Law. I  
17 have been working at the Public Defenders Office since the  
18 year 2000.

19 Q Were you licensed to practice in 2000?

20 A I was.

21                   Q               What is your current position at the  
22 Public Defenders Office?

23                   A               I am a staff attorney in Knox County  
24 Criminal Court Division II.

25                   Q               Have you worked in other courts besides



1 Division II?

2           A           I have. During the eight years that I've  
3 worked at the Public Defenders Office, I've had a chance to  
4 work in Misdemeanor Court, Felony Court, Juvenile Court,  
5 Division I of the Criminal Courts, and I've handled cases in  
6 Division III, as well.

7           Q           What's your caseload like right now?

8           A           My caseload since I began in Division II  
9 has, frankly, been unbearable. I think--if I could give you  
10 an example. It's one that I remember from childhood. It's  
11 a Lucille Ball show. There was an episode where she was  
12 working a conveyor belt, and she was doing well at first.  
13 She was, I think, packaging candies. And when the conveyor  
14 belt began she was doing pretty good, but at some point, as  
15 the conveyor belt either sped up or continued that constant  
16 pace, Lucille Ball couldn't handle all those candies. And I  
17 think that that's where I'm at with my cases.

18          Q           How often are you in court?

19          A           I average four days a week.

20          Q           I'd like to just talk about what you're

21 able to do in representing your clients. How much time do  
22 you have to interview your clients?

23           A           It's shameful because these are people  
24 who are in criminal courts, so they've already passed  
25 through that first step. Their cases are likely to be tried

1 or there's going to be a lot of negotiation involved...but I  
2 probably spend 30 minutes to interview the client, unless  
3 it's a violation of probation, and then I spend less time  
4 doing that.

5 Q Are you able to interview other fact  
6 witness besides your client?

7 A I very seldom speak to other fact  
8 witnesses. If I have a client who wants me to speak with a  
9 friendly witness, then I may speak with that person, that  
10 investigator; otherwise, I attempt to get an investigator in  
11 my office to interview adverse and friendly witnesses.

12 Q Are you able to conduct further factual  
13 investigation; for example, visiting the crime scene,  
14 getting background information on your clients?

15 A Very seldom do I visit a crime scene. If  
16 it is a murder case more than likely I'm going to see what  
17 that scene looks like; otherwise, if I feel that it's  
18 important for me to see what a place or a road look like, I  
19 will ask the investigator to take a picture. But it's so  
20 difficult to see and get an accurate idea of land or a home

21 or apartment from a picture.

22                   Q           Are you able to do any legal research in  
23 regard to your clients' cases?

24                   A           I do very little legal research, and our  
25 clerks are usually extended to the point that little

1 research is done in my cases.

2 Q What are things that are essential to  
3 preparing your clients' cases that you're not able to do  
4 because of your caseloads? If you can just give a couple of  
5 examples.

6 A Sure. I think most importantly a client  
7 deserves to know what's going on in their case and to feel  
8 comfortable with the attorney that is representing them,  
9 have an idea who that person is that's going to be  
10 responsible for a large portion of their life, but I am not  
11 able to fill that responsibility to my client.

12 Secondly, as you just asked, I very seldom see  
13 crime scenes. I very seldom am able to speak with  
14 witnesses. Very seldom am I able to do research on a case.  
15 I'm meeting very few of the standards for my cases that I  
16 should.

17 Q You kind of anticipated my next  
18 questions. You are familiar with the Tennessee Rules of  
19 Professional Conduct and the constitutional standards for  
20 effectiveness of counsel?

21                   A            I am.

22                   Q            And are you familiar with the ABA  
23 Standards for the Defense Function?

24                   A            I am.

25                   Q            And what is your opinion of your

1 abilities to meet those standards under your current  
2 caseload?

3 A Well, some of my clients may benefit from  
4 me doing more on their case, and I may be able to  
5 competently represent them according to the standards. Most  
6 of my clients I do not.

7 Q I have no further questions.

8 JUDGE EMERY: Questions?

9 (No response.)

10 JUDGE EMERY: Thank you, Ms. Murray.

11 MS. MURRAY: Thank you.

12 MR. LOVE: Thank you, Your Honors.

13 MR. BAHNER: There are other public  
14 defenders we would call whose testimony would be similar.  
15 These are examples, these two people, and we thought that  
16 rather than putting on a number of people we would stop with  
17 these two. But if Your Honors are interested in hearing  
18 from others, we can put on other witnesses today.

19 (Off the record discussion.)

20 JUDGE MCGEE: I'd be willing to accept

21 that the rest would be similar--

22 JUDGE EMERY: Yes. We assume that the  
23 testimony would be relatively the same--

24 MR. BAHNER: It would be, Your Honor.

25 JUDGE EMERY: --consistent. And



1 therefore, that's sufficient for our purposes.

2 MR. BAHNER: Thank you, Your Honor.

3 MR. BAHNER: We'd like to call Professor  
4 Norman Lefstein. Professor Lefstein has already been sworn.

5 EXAMINATION

6 BY MR. BAHNER:

7 Q Professor, for the record, will you  
8 please state your name and your current position.

9 A Yes. My name is Norman Lefstein. It is  
10 spelled L-e-f-s-t-e-i-n. I am a professor of law and Dean  
11 Emeritus of the Indiana University School of Law in  
12 Indianapolis.

13 Q What is your educational background,  
14 Professor Lefstein, undergraduate and law school?

15 A I attended Augustana College in Rock  
16 Island, Illinois. I graduated from University of Illinois  
17 College of Law in 1961, and I received the master of law  
18 degree from Georgetown University Law School in 1964, as  
19 part of a fellowship trial advocacy program in which I  
20 furnished criminal and juvenile defense representation in

21 trials and on appeals in the District of Columbia Federal  
22 Court.

23 Q Would you please summarize your  
24 employment history for the Court.

25 A Following law school graduation, I was in

1 private practice for several years. I then entered a  
2 program at Georgetown Law Center furnishing defense work in  
3 (inaudible) criminal and juvenile cases. Following that I  
4 was assisting the United States Attorney in Washington, D.C.  
5 After that I organized and managed a Ford Foundation  
6 program, putting lawyers in juvenile courts in three cities  
7 in the United States: Chicago, Newark and Cleveland. Those  
8 lawyers were providing indigent defense work in juvenile  
9 cases. Subsequently, I was involved in a policy-making role  
10 in the United States Department of Justice, dealing with  
11 criminal matters, and then in 1969 I became Deputy Director  
12 and later Director of what became known as the Public  
13 Defender Service of Washington, D.C.

14 In 1975 I joined the faculty of the University of  
15 North Carolina School of Law at Chapel Hill, where I taught  
16 in the criminal law procedure area, trial advocacy and  
17 professional responsibility, including a seminar in  
18 prosecution and defense ethics. And then in January 1988, I  
19 became the dean of the law school at Indiana University  
20 School of Law in Indianapolis, and I held that position for

21 almost 15 years, retiring as dean in the summer of 2002, and  
22 since that time I have been the emeritus dean and a  
23 professor of law at the school.

24 Q Have you been qualified to testify as an  
25 expert witness, Professor Lefstein?

1                   A            Yes.

2                   Q            In what types of cases have you been  
3 qualified to testify as an expert witness?

4                   A            These have been cases that have involved  
5 issues of professional responsibility, quality  
6 representation in criminal cases. Some of the cases have  
7 involved issues very similar to what is being heard here  
8 today dealing with caseloads of public defenders. There  
9 have been some of the cases that were entirely civil in  
10 nature involving matters of ethics, but most of them have  
11 been in the criminal area.

12                  Q            What has been the nature of your work in  
13 the area of indigent defense of persons charged with  
14 crimes?

15                  A            Well, I've held a number of different  
16 positions with the American Bar Association and with other  
17 organizations dealing with matters of criminal defense and  
18 defense representation generally. I'm a former chair of the  
19 section of criminal justice of the American Bar Association,  
20 which is approximately a 10,000 member section of the ABA.

21 I have on different occasions been a member of the American  
22 Bar Association Standing Committee on Legal Aid and Indigent  
23 Defendants.

24 I was a consultant to the ABA Standing Committee on  
25 Legal Aid and Indigent Defendants in the late 1970's and

1 early '80s. I am currently in that position today as a  
2 consultant to that committee. I am currently a reporter on  
3 behalf of what is known as National Right to Counsel  
4 Committee, which was organized by the Constitution Project  
5 and the National Legal Aid and Defender Association of  
6 Washington, D.C., and there are a number of other capacities  
7 of which I've been involved in matters related to indigent  
8 defense that are listed in my curriculum vitae.

9 Q Have you done work in connection with  
10 federal death penalty cases?

11 A Yes. I was retained by a subcommittee,  
12 the Judicial Conference of the United States, dealing with  
13 defense services, and in that capacity I headed up a study  
14 on quality and costs of defense representation in federal  
15 death penalty cases. That was a several-year study that  
16 gave a number of recommendations, and those recommendations  
17 were ultimately adopted by the Judicial Conference of the  
18 United States pertaining to federal death penalty cases.

19 Q Have you been retained by the American  
20 Bar Association, Professor Lefstein, to create a guidebook

21 on indigent defense?

22                   A                   That's my current consulting position  
23 with the American Bar Association Standing Committee on  
24 Legal Aid and Indigent Defendants. Under a grant from a  
25 foundation, the ABA has asked me to prepare a guidebook that



1 will deal with law and ethics in public defense in the  
2 United States. I'm currently in the first year of that  
3 project, which is overall going to be a three-year project  
4 and will result in a publication dealing with kinds of  
5 subjects that are at issue here this morning.

6 Q Have you previously published articles  
7 relating to representation of indigent defendants charged  
8 with a crime?

9 A Yes. In addition to the study for the  
10 Judicial Conference of the United States, I published a  
11 mynograph dealing with criminal defense services to the  
12 poor, and it was published by the American Bar Association  
13 in 1982. That was based both upon field work and other data  
14 that was gathered at the time. I co-authored probably the  
15 most recent national report dealing with criminal defense in  
16 the United States, which was published by the American Bar  
17 Association in 2004, entitled "Criminal Defense--I'm sorry,  
18 entitled "Gideon's Broken Promise: America's Continuing  
19 Quest For Equal Justice."

20 I published a Law Review article in about the same

21 year, which was in the Hastings Law Journal, and it was a  
22 comparative study of criminal defense practices in the  
23 United States compared with those in the United Kingdom. I  
24 published a study dealing with death penalty cases in  
25 Indiana and its implications for the nation, dealing with

1 some empirical data in Indiana on the handling of death  
2 penalty cases, and I've published some other articles that  
3 deal with indigent defense.

4 I also did not mention, but it's certainly relevant  
5 to this hearing, that I was for 17 years the chairman  
6 appointed by two different Indiana governors of the Indiana  
7 Public Defender Commission. It's a very different system of  
8 indigent defense in the state of Indiana, but I chaired the  
9 commission from the year 1990 till the year 2007, and during  
10 that time we promulgated the standards related to the  
11 caseloads for lawyers doing public defense work in the state  
12 of Indiana who were under the commission's standards. Not  
13 all of the lawyers in the state are or were, but for those  
14 who were under the commission standards there were some  
15 maximum caseload numbers that they had to comply with, and  
16 they were monitored by the state's commission.

17 Q In connection with publications, let me  
18 ask you specifically if you were author of an article on  
19 excessive defender caseloads the ABA Ethics Committee  
20 raised, published by the National Association of Criminal

21 Defense Lawyers in December of 2006?

22           A           Yes. That's an article that I did not  
23 mention. I believe it was, in fact, attached to an  
24 affidavit I filed in this case. But I did publish an  
25 article--

1                   (Interruption in the proceedings.)

2                   A            --dealing with a recent ethics opinion of  
3   the American Bar Association Formal Opinion 06-441, dealing  
4   with the special responsibilities of public defenders, and  
5   for that matter other lawyers, in handling a caseload that  
6   may present problems for them in discharging their  
7   responsibilities under the Rules of Professional Conduct.

8   BY MR. BAHNER:

9                   Q            Professor, I have here your curriculum  
10   vitae, and I would like to make this an exhibit.  It is  
11   attached to--

12                               JUDGE EMERY:  Yes.  We don't need copies.

13                   (Whereupon, the above referenced document was  
14   introduced as Exhibit No. 8.)

15                               MR. BAHNER:  And may it please the Court,  
16   Professor Lefstein has prepared an affidavit which was filed  
17   in this case.  We would like to have the privilege of  
18   modifying that affidavit and filing it as a late filed  
19   affidavit--

20                               JUDGE EMERY:  Okay.



1 JUDGE EMERY: Absolutely.

2 MR. BAHNER: --we'd like to be able to  
3 file that.

4 JUDGE EMERY: Sure.

5 (Whereupon, the above referenced document, when  
6 supplied, will be introduced as Late Filed Exhibit No. 9.)

7 MR. BAHNER: May it please the Court, we  
8 would like for Professor Lefstein to be allowed to testify  
9 as an expert witness in this case, based on--

10 JUDGE EMERY: I think we've got a  
11 consensus on that.

12 MR. BAHNER: All right. Thank you.

13 BY MR. BAHNER:

14 Q Professor, we engaged you as counsel for  
15 the Knox County Public Defenders Office to study the  
16 caseload situation which exists in that office and to render  
17 an opinion. Would you please briefly describe for the Court  
18 what work you have done before reaching a conclusion and  
19 being able to render an opinion?

20 A Surely. I talked, obviously, with Mr.

21 Stephens. I've talked with Mr. Merkle and another lawyer in  
22 their office. I've talked extensively with you, as well as  
23 the other associates of yours in connection with this case.  
24 I've looked at all of the data that has been submitted here  
25 in court and made a prior trip to Knoxville where we went



1 over a bunch of these same data and discussed this case at  
2 some considerable length, so this is really my second trip  
3 to Knoxville, so I'm, at this point, well-immersed in all  
4 kinds of data and material which is now being presented to  
5 the Court.

6 Q Do you have an opinion about the overall  
7 caseload of the Public Defenders Office in Knox County?

8 A Yes, I do. It's excessive. I think that  
9 it interferes with the ability of the lawyers to provide  
10 competent representation as required by the Rules of  
11 Professional Conduct. I think it interferes with the  
12 ability to be effective under the Sixth Amendment, and I  
13 think it constantly jeopardizes the fairness of the  
14 proceedings. And, frankly, it rifts the potential for  
15 genuinely innocent people pleading guilty to offenses to  
16 which they ought not to plead and sometimes risking a  
17 conviction of actually innocent people.

18 I might say, parenthetically, that one of the  
19 realities of the justice system - knowing since 1989, the  
20 first DNA case - is that genuinely innocent people sometimes

21 get convicted in our justice systems. It's happened in  
22 Tennessee. It's happened throughout the country. And the  
23 best defense is to have adequately trained lawyers who have  
24 ample opportunity to represent their clients.

25                   Q                   What do you understand about how the

1 Public Defender Office operates and handles his workload in  
2 Knox County?

3           A           Well, this office, as Mr. Stephens  
4 testified this morning, by reason of the statute operates  
5 with a system of indigent defense which has been long  
6 condemned by the American Bar Association. They operate  
7 with horizontal representation, so you don't have a model  
8 that you would typically have in a private law firm of a  
9 lawyer starting a case from the beginning and being with the  
10 client throughout, establishing a relationship of trust and  
11 confidence, but instead at different stages of a case they  
12 often will of necessity have to have a different lawyer.  
13 And, undoubtedly, clients feel if they have a public  
14 defender they may not have felt that they had their own  
15 lawyer. But that's really the contrast between horizontal  
16 and what is often referred to as vertical representation.

17           Q           You have spent time studying the pending  
18 caseloads. Would you compare that with your personal  
19 experience as head of the Public Defender Office in  
20 Washington and what the current situation is there?

21                   A                   Okay.  There are really two parts to  
22   that, and let me explain it this way.  As a manager of a  
23   public defender office, one of the things that you really  
24   want to know - and this is one of the ways in which to  
25   understand the caseload or caseloads of an office - you want

1 to know how many cases a lawyer is responsible for at a  
2 given time, and I wanted to know that as I was preparing to  
3 appear in this case. And we asked Mr. Merkle to run some  
4 numbers on the total numbers of pending cases; for example,  
5 in the DUI Division of General Sessions, in Felony General  
6 Sessions and Misdemeanor General Sessions and in the  
7 juvenile area, the numbers that were pending as of a given  
8 time.

9           Well, the cases he was able to run the numbers on  
10 was May 1st, 2008, and looking then at the gross numbers and  
11 then dividing those gross numbers by the number of attorneys  
12 assigned to those particular divisions, Juvenile Court, DUI,  
13 Misdemeanor and Felony, you can determine roughly the  
14 average number of cases for which each individual lawyer is  
15 responsible.

16           The lawyers themselves, incidentally, don't really  
17 know how many they're really responsible for, because of the  
18 way in which the calendar has to be maintained, but if you  
19 take the numbers that Mr. Merkle furnished to me as of May  
20 1st you find, for example, that in the DUI Division each

21 lawyer on average, as of that date, was responsible for  
22 about 275 cases.

23 Q Now, that's Exhibit 5?

24 A That is Exhibit 5, yes.

25 Q Excuse the interruption.

1           A           And because they are handling those in an  
2 horizontal representation fashion, they don't really have a  
3 personal attachment to that case until just before the case  
4 might actually come up in court. If they can do the  
5 interviews in the way in which it was described here, the  
6 interviews are conducted in 30-minute intervals. In the  
7 Felony Division they're each responsible on an average week  
8 five lawyers for 150 cases. In the Misdemeanor Division  
9 they're each responsible, the four lawyers, for about 365  
10 cases on average, and in Juvenile 179 cases.

11           These are extraordinary numbers of individuals for  
12 which individual attorneys are responsible, and it is no  
13 surprise that the lawyers don't feel and have testified  
14 here, the two that did, and Mr. Stephens certainly has, that  
15 they cannot discharge all of the requisite kind of  
16 responsibilities that they have as lawyers, whether you're  
17 talking about the Defense Functions Standards of the  
18 American Bar Association or whether you're talking about the  
19 Rules of Professional Conduct of the Tennessee--the governed  
20 lawyers in Tennessee.

21                   Now, you ask me about the contrast between that and  
22 the Public Defender Service in Washington, D.C. The Public  
23 Defender Service in the Washington, D.C. program operates a  
24 vertical representation, and frankly, it bears almost no  
25 relationship to the way in which the program in Knox County



1 is forced to operate.

2           The felony lawyers--and they do most of the serious  
3 felony work in the District of Columbia in what are common  
4 law courts, by the way. These are not in federal court,  
5 these lawyers in D.C., so they are comparable to what you  
6 have here in Knox County. The lawyers handling these felony  
7 cases in my day and today - because I know what the  
8 situation is today, and I'll explain why in a moment - they  
9 never were permitted to have more than 30 or 35 pending  
10 felony cases. They just didn't have that, and the reason  
11 they didn't have more than that was that they simply  
12 couldn't handle it, and we had many more investigators than  
13 what this office has.

14           We had a staff of--in my day. Now they have more  
15 than that. But in my day, back in the '70s, we had 10 or 12  
16 investigators, and we had probably 40 or 50 law students who  
17 were paid to work for us on an hourly basis. We had all  
18 kinds of people running all over the city conducting  
19 investigations in criminal cases. Today the numbers are  
20 approximately the same.

21                   And I had a conversation as recently as May 2nd for  
22 work I'm doing in connection with the ABA project that I  
23 described earlier. I had an in-depth conversation with the  
24 current director of my former office, and I wanted to  
25 understand what is happening today versus how it was in my

1 day, some 30-plus years ago, and basically, the numbers  
2 haven't changed because they operate the same way. And it  
3 is very similar to the way in which a private law firm would  
4 provide representation. It is just altogether different  
5 than what you have here.

6           Now, you can go ahead and talk about Juvenile Court  
7 or Misdemeanor cases, DUI Division, and again, in D.C. and  
8 in some other very excellent defense programs you'll find a  
9 totally different way in which these cases are represented,  
10 and you come much closer, certainly in D.C. and in some  
11 other programs that I've had occasion to look at, where the  
12 responsibilities under rules of professional conduct and  
13 under, for example, the defense function standards of the  
14 ABA, the lawyers really can do a far, far better job of  
15 fulfilling their responsibilities.

16           I didn't say this earlier, but I perhaps should  
17 also explain that I was the reporter for the defense  
18 function standards of the American Bar Association for the  
19 second edition, which were approved by the American Bar  
20 Association House of Delegates in 1979, and I chaired the

21 task force that oversaw development of the third edition of  
22 those standards, which were approved by the ABA House of  
23 Delegates in either 1992 or 1993, and the chart that was  
24 before you--and I think it might have been Exhibit 1,  
25 perhaps?

1           Q           Yes. I have Exhibit 1 here, which is  
2 the NAC standards and--

3           A           It was one of the other ones that set  
4 forth--

5                       MR. BAHNER: Would you put No. 2 up  
6 there.

7                       MS. WILLIAMS: (Complies.)

8           A           It's the chart that contains the  
9 responsibilities of a lawyer providing representation in a  
10 criminal case, and those are provisions that are derived  
11 from a fairly substantial publication of the ABA dealing  
12 with the defense function. There's a comparable one for the  
13 prosecution function. And what you have on that exhibit  
14 were some of the most important, by no means all, but some  
15 of the most important responsibilities of a lawyer providing  
16 representation in a criminal case.

17 BY MR. BAHNER:

18           Q           Would you comment on the disparity  
19 between the NAC workload standards and the workloads carried  
20 by the lawyers in the Knox County Public Defenders Office?

21                   A                   Well, let me say, first of all, that -  
22   and I think this is evident now - the numbers of cases that  
23   the Knox County Defender Office is handling per lawyer far  
24   exceed maximum caseload numbers that were promulgated by  
25   what was known as the National Advisory Commission on

1 Criminal Justice Standards and Goals in 1973. Mr. Stephens  
2 referred to it as '78, but it was actually 1973. And what's  
3 interesting about those numbers are that they were really  
4 never based on any study or empirical work of any kind, and  
5 indeed, there's language I think I quoted in my affidavit  
6 that suggested that they might have been out of date even at  
7 the time the National Advisory Commission embraced them.

8 I will tell you that in the District of Columbia,  
9 in Massachusetts, which has a very well-funded program, the  
10 lawyers handling felony cases, for example, never came close  
11 to handling 150 felony cases over the course of a year.  
12 They just simply couldn't do it. The lawyers in my office  
13 rarely closed 150--they rarely closed 100 felony cases over  
14 the course of a year. You just can't come up with those  
15 kind of numbers, especially when you consider the number of  
16 days available to work that are going to have to be done to  
17 adequately prepare the case.

18 In August of 2007, the American Council of Chief  
19 Defendants, which is an organization made up of current  
20 chief defendants, part of the National Legal Aid and

21 Defender Association, they passed a resolution that said the  
22 numbers that the National Advisory Committee promulgated in  
23 1983 should never be exceeded. That is essentially what the  
24 ABA has said. But then they went ahead, in this August 2007  
25 resolution, which I don't think has been produced here, but



1 they went ahead and they wrote a long commentary, and  
2 there's no way you can read that commentary that deals with  
3 all of the ways that criminal defense has changed over the  
4 last 25, 30 years that conclude that those numbers are  
5 anywhere near accurate. They may be accurate for appeals.  
6 They may be accurate for mental health. But in some of the  
7 other areas they simply are no longer accurate, if they ever  
8 were. And I, frankly, don't think they ever were.

9 I want to make one other point, and it is  
10 a point that is emphasized in the opinion of the American  
11 Bar Association. All cases are not created equal, all  
12 lawyers not created equal, and you can't reduce all defense  
13 representation to numbers. You have to make an individual  
14 judgment about whether the caseload that a lawyer is  
15 carrying at any given time is excessive, and whether the  
16 lawyer can do everything they need to do on those cases.

17 Some cases will involve vastly more work than other  
18 cases. In a law firm setting or in a adequately staffed and  
19 funded defender program, there are going to be supervisors  
20 who are looking closely at the numbers of cases the lawyers

21 have and making a judgment and collaboration with the  
22 attorneys whether they can adequately do what they need to  
23 do on those cases in performing their job effectively.

24           The Knox County Defender Office really doesn't have  
25 the staff to do that. They are thrown into a situation

1 where it is all out of their control, and as a result you  
2 have the kind of representation that has been described  
3 here. But it is not representation, in my opinion, which is  
4 consistent with notions of competence or with the  
5 requirement of providing effective assistance, and it  
6 certainly is inconsistent with the defense function  
7 standards. And I might say, as Your Honors perhaps are  
8 aware, that those defense function standards of the American  
9 Bar Association have been cited repeatedly by fellow courts,  
10 including the United States Supreme Court, as standards for  
11 defense practice in the United States.

12 Q Professor, I'm looking now at Exhibit 3,  
13 which I have put up here. In your opinion, is it possible  
14 for the lawyers in the Knox County Public Defenders Office  
15 to provide effective assistance of counsel and incorporate  
16 the types of things listed in this list as necessary with  
17 the caseloads and workloads they have?

18 A It simply is impossible. That's what Mr.  
19 Stephens has said. That's what two members of the staff  
20 have said. And all of my knowledge of public defense tells

21 me they simply cannot discharge their requisite  
22 responsibilities with the kinds of caseloads they have.

23 Q Are you generally familiar with the  
24 Tennessee Rules of Professional Conduct?

25 A Yes.

1           Q           Are some of these rules relevant to the  
2 caseloads of lawyers working in the Public Defenders Office  
3 in Knox County, Tennessee?

4           A           Yes, a number of them are very relevant.

5           Q           I'm going to put up here on the board...

6                   MR. BAHNER: And we want to have this  
7 marked, although you all know these as members of the Court,  
8 but this will be Exhibit 10, I believe.

9 BY MR. BAHNER:

10          Q           Without my asking questions about each of  
11 these, Professor, would you please comment on the importance  
12 of these rules which have been promulgated by our Tennessee  
13 Supreme Court in Rule 8?

14          A           Yes. The rules that you have on your  
15 exhibit adopted by the Tennessee Supreme Court are, I  
16 believe, in every single respect, identical to the American  
17 Bar Association Bylaws of Professional Conduct. I've taught  
18 professional responsibility on and off since 1975, and one  
19 of the things that I've told students repeatedly throughout  
20 the years is that the first duty of a lawyer is to abide by

21 Rule 1.1, to be competent, requiring the legal knowledge,  
22 thoroughness, and preparation required in a case, and when  
23 you cannot be competent, then you have a mandatory duty  
24 under Rule 1.16, the bottom provision there - it's actually  
25 1.16(a)(1) - to seek to withdraw from the representation,

1 assuming it's in a court and it requires court approval, or  
2 if you are not appointed, obviously, you have a mandatory  
3 duty to withdraw without going to court. And you have to  
4 understand these rules are interconnected, because they  
5 really are very much related one to another, and therefore,  
6 if you cannot be competent under Rule 1.1 you have a duty  
7 under 1.16 to seek to withdraw.

8           The other provisions I think are largely  
9 self-explanatory and were commented on by Mr. Stephens.  
10 There is a comment to Rule 1.3 on diligence which requires  
11 that you act with reasonable diligence and promptness in  
12 representing a client, and the comment that appears in  
13 Comment 1 to Rule 1.3 is to the effect that you must control  
14 your workload in order that your representation can be  
15 adequate, is the language in that comment.

16           And, of course, 1.7 is the general provision on  
17 conflict of interest, 1.7(b), and what it provides is that  
18 where duties of representation to one client will be  
19 materially limited by your responsibilities to another  
20 client, you have a conflict of interest unless...unless two

21 conditions are met. One is that you reasonably believe that  
22 your representation will not be reasonably affected, and the  
23 other is that the client consents, but you can't ask for the  
24 client's consent unless you reasonably believe that your  
25 representation will not be--will be adequate. And what



1 you've heard here today is the lawyers really don't believe  
2 their representation is adequate.

3 MR. BAHNER: We would like for this board  
4 to be marked as the next exhibit...Exhibit 10.

5 (Whereupon, the above referenced document was  
6 introduced as Exhibit No. 10.)

7 BY MR. BAHNER:

8 Q Professor Lefstein, are you familiar  
9 with the ABA Formal Opinion 06-441?

10 A Yes.

11 Q This opinion has certain forerunners.  
12 Would you please discuss the forerunners to this opinion and  
13 the effect of this opinion and the relevance of this opinion  
14 to the issues we're considering today?

15 A Well, when you talk about forerunners in  
16 defense there are several forerunners, but there certainly  
17 are standards of the ABA directed at public defense lawyers  
18 that in fact said some years ago exactly what the ABA  
19 Standing Committee on Ethics and Professional Responsibility  
20 said in 2006.

21               There is another standard chapter dealing with  
22 providing defense services for which I was also the reporter  
23 for the second edition and chaired the task force in the  
24 third edition, and that one is not presented here as an  
25 exhibit, but there's a standard, 5-5.3, of providing defense

1 services, and--I don't recall if it's in my affidavit, but  
2 what that standard says is that lawyers who have excessive  
3 caseloads should move to withdraw or--and also decline to  
4 accept additional cases if that's necessary in order to  
5 alleviate the excessive caseload. In a sense, it's really  
6 no different from what the Rules of Professional  
7 Responsibility already provide. Actually, the first  
8 standard on this issue was promulgated before the ABA  
9 adopted the Rules of Professional Conduct in 1983. The  
10 standard was actually developed under the old Code of  
11 Professional Responsibility. So for this basic notion that  
12 if you are court appointed and you are required to move the  
13 court to get out, or the court is appointing you and you  
14 need to decline additional cases, this basic notion that you  
15 need to move the court for relief has been around a long,  
16 long time.

17           So, with the ethics opinion of the ABA, essentially  
18 all the Standing Committee on Ethics and Professional  
19 Responsibility of the ABA did was to make clear what I think  
20 was already clear, under standards and under the Rules of

21 Professional Conduct; namely, that if you can't discharge  
22 your representation competently under the rules, you've got  
23 a duty to seek relief from the courts to have the court  
24 allow you to withdraw and to stop the appointment of  
25 additional cases if those steps are necessary in order to

1 manage your caseload.

2           And what I suppose is important about that ethics  
3 opinion is the ABA Standing Committee on Ethics and  
4 Professional Responsibility is the most prestigious, most  
5 often cited ethics body we have in the United States, and  
6 what they basically said is there are no exceptions for  
7 public defenders. I never thought there were any exceptions  
8 for public defense, but they made it crystal clear that  
9 there is not and cannot be an exception.

10           What it seems to me the Knox County Defender Office  
11 is doing and what Mr. Stephens is doing is, frankly,  
12 discharging their responsibilities under the Rules of  
13 Professional Conduct consistent with that ethics opinion  
14 that is in the highest tradition of the legal profession in  
15 this country.

16                       MR. BAHNER: May it please the Court, I  
17 would like to make this opinion the next exhibit, which  
18 would be 11.

19           (Whereupon, the above referenced document was  
20 introduced as Exhibit No. 11.)

21 BY MR. BAHNER:

22 Q Although we touched on it earlier, I'd  
23 like for you briefly to comment on the difference between  
24 caseload and workload, Professor Lefstein.

25 A Well, caseload is meant to refer to a

1 number of pending cases that a lawyer has, or sometimes the  
2 number of cases they've handled over a period of time.  
3 Workload, on the other hand, refers to all of the  
4 responsibilities of the lawyer as a professional employee,  
5 for example, in a public defender program, and therefore, in  
6 ABA Principle No. 5 of a public defense delivery system,  
7 which you have introduced as an exhibit - the last, 11 -  
8 there's a brief comment that says the concept of workload,  
9 that a caseload adjusted by factors such as case complexity,  
10 support services, and an attorney's nonrepresentational  
11 duties, such as attendance at the CLE, is a more accurate  
12 measurement in terms of assessing a lawyer's overall  
13 responsibility in the office.

14 Q Has Mr.--or has any public defender, to  
15 your knowledge, made those subtle evaluations in determining  
16 what the real workload is so that it can be reduced to a  
17 numerical count?

18 A Well, I think there are some that make  
19 the kind of individualized assessment that needs to be made.  
20 There are probably others that try to push the numbers maybe

21 more than they should. But I think that ultimately there's  
22 no way to avoid making some individualized assessments.

23 Q Based on your experience - and you've  
24 been a prosecutor as well, working in the Attorney General's  
25 Office - are there differences between what investigation an



1 Attorney General's office has to do, generally, and what  
2 must be done by a lawyer in a public defender office?

3           A           Well, I thought Mr. Stephens said it well  
4 this morning, that when you start out as a public defender  
5 representing a client, you normally have a sheet of paper or  
6 two, maybe, from the police department, giving you some  
7 basic facts. I'm not certain exactly what you get here in  
8 Knox County. But you really have to investigate the case in  
9 a way that typically--as a former Assistant U.S. Attorney in  
10 Washington, D.C., I had most of what I needed to try the  
11 case almost immediately, and what I didn't have I could get  
12 through the Metropolitan Police Department or through one of  
13 the federal agencies.

14           We did handle some cases that had been investigated  
15 by the FBI who would write voluminous reports. Most of our  
16 cases came from the Metropolitan Police Department in D.C.,  
17 and if I needed something additional, as Mr. Stephens  
18 explained, I had officers that I could call upon to do what  
19 I needed done, and I had a laboratory that did the kind of  
20 testing that needed to be done. It's just very different in

21 doing public defense work.

22           Q           In your opinion, given the caseloads and  
23 workloads at the Knox County Public Defenders Office, can  
24 the lawyers now consistently represent their current clients  
25 in accordance with the Tennessee Rules of Professional



21 with the relief that's been sought by Mr. Stephens. Have  
22 you considered whether or not that's the best way to do  
23 that?

24                                   PROFESSOR LEFSTEIN: Well, I think that  
25 it would certainly--I'd like to say two things in response

1 here. I think it would certainly help the situation with  
2 his office. I don't think it's a panacea, because I think  
3 the caseload may still be a significant problem for his  
4 office. That's the first thing I want to say.

5           The second thing I wanted to say was that if it's  
6 not done this way, then I think the individual lawyers have  
7 responsibilities to go before judges and to make the kind of  
8 case that has been made here on a much larger scale for the  
9 entire office.

10           I didn't go into this when I talked about the ABA  
11 Ethics Opinion or the Rules of Professional Conduct, but  
12 what is very clear is that the head of a program -  
13 supervisor, whatever you want to call the person - under the  
14 Rules of Professional Conduct have the duty to make sure  
15 that his or her lawyers are not violating their  
16 responsibilities, and Mr. Stephens is discharged with his  
17 responsibility as the head of the office and has dealt with  
18 Provision 5.2 or 5.3 of the Rules of Professional Conduct,  
19 but in addition to that, the individual lawyers have a  
20 responsibility, and so that if it isn't being done by Mr.

21 Stephens it ought to be done, in my opinion, by the  
22 individual lawyers. And what, in effect, Mr. Stephens has  
23 sought to do here is to come before this Court on behalf of  
24 the entire office and thereby avoid the filing of individual  
25 motions that may be made by individual attorneys, and I

1 think he suggested as much here today.

2           Now, this seems therefore to be a very efficient  
3 way in which to address the problem, but I think your  
4 question really is that the question is, is this a solution  
5 for the office and better than any other solution, and I  
6 expect that people closer to this office are in a better  
7 position to make that assessment. But I'm concerned that  
8 even with this solution problems may remain, but that  
9 ultimately is a decision that will have to be made here  
10 locally. It's not one that I am qualified to give perhaps  
11 the best opinion on.

12                   JUDGE EMERY: Any other questions?

13           (No response.)

14                   JUDGE EMERY: Okay.

15                   JUDGE MCGEE: Thank you.

16                   JUDGE EMERY: Thank you for your time.

17                   MR. BAHNER: We would like for Professor  
18 Lefstein to be excused, if he may, so he can catch a plane  
19 and go back home.

20                   JUDGE EMERY: Absolutely.

21 JUDGE MCGEE: Certainly.

22 PROFESSOR LEFSTEIN: As much as I hate  
23 to miss the afternoon, but thank you very much Your Honors  
24 for your attention.

25 JUDGE EMERY: Thank you.



1 I think at this point we're due for  
2 another recess, five or ten minutes or so.

3 (Recess was taken.)

4 MR. MOORE: As our next witness we call  
5 Tom Dillard. He has not been sworn.

6 JUDGE EMERY: (Swears the witness.)

7 EXAMINATION

8 BY MR. MOORE:

9 Q Mr. Dillard, would you state your name  
10 for the record.

11 A My name is William Thomas Dillard.

12 Q And you are known to the members of this  
13 Court. Would you just state for the record, very briefly,  
14 your background and your current position.

15 A I graduated from UT College of Law in  
16 1964, began practice in 1965 with Harold Stone, stayed there  
17 for a couple of years and then went into the District  
18 Attorneys Office here in Knoxville in November of 1967.  
19 (Indicates.) Excuse me, I've got a cold.

20 In 1976 I was appointed full-time Magistrate for

21 the Eastern District of Tennessee, and then in 1978 I came  
22 back to the U.S. Attorneys Office as Chief Assistant, a U.S.  
23 Attorney to John Kerry, who was U.S. Attorney at that time,  
24 stayed there in that office until 1983, when I was  
25 appointed by President Reagan as a U.S. Attorney in the

1 Northern District of Florida. I remained there until Bob  
2 Ritchie convinced me to come back to Knoxville in 1987, and  
3 he and I and Charles Fels formed the firm of Ritchie, Fels &  
4 Dillard. And I'm still in that firm, which is Ritchie,  
5 Dillard & Davies, and I am senior partner, I guess; the old  
6 head in the firm, anyway. And I've been there for 21 years  
7 practicing predominantly, almost exclusively, criminal  
8 defense.

9 Q Do you know Mark Stephens?

10 A I know Mark Stephens very well, yes.

11 Q How long have you known him?

12 A At least 21 years.

13 Q And are you familiar with the Knox County  
14 Public Defenders Office?

15 A Yes, sir.

16 Q Are you familiar with the courts in Knox  
17 County that handle criminal cases, Sessions and the Criminal  
18 Courts?

19 A Yes, I am.

20 Q And I think you said that a hundred

21 percent of your practice was criminal pretty much?

22 A Close to a hundred percent, yes, sir.

23 Q And what percent of that is in the courts  
24 here in Knox County?

25 A It does vary, but I'd say on an average

1 it's probably 25 to 30 percent here in Knox County.

2 Q And, Mr. Dillard, I believe you submitted  
3 an affidavit in this case?

4 A Yes, I did.

5 Q Are you familiar with the obligations  
6 that an attorney has under the U.S. Constitution and the  
7 Tennessee Constitution and the Tennessee Rules of  
8 Professional Conduct, with respect to that attorney's  
9 relationship with the client and the court?

10 A Yes.

11 Q I think you were a member of a committee  
12 here in Tennessee that undertook a provision of the ethical  
13 rules?

14 A That's correct. It was formed in 1995, I  
15 believe, and after about six to seven years of work on the  
16 provision we submitted the current Rules of Professional  
17 Conduct.

18 Q Have you reviewed Mr. Stephens' sworn  
19 petition in this case?

20 A I have.

21                   Q                   Based upon your knowledge and experience,  
22 do you have an opinion, first, on the caseloads that are  
23 carried by Assistant Public Defenders in Knox County and how  
24 that affects their work...based on your knowledge and your  
25 experience?

1           A           Well, my knowledge and my experience  
2 would lead me to say I couldn't do it. I've been in  
3 practice for 43 years now, and the caseload that these  
4 attorneys handle, I'm amazed. I know most of them. They  
5 are extremely good lawyers, and I'm proud of what they do.  
6 I'm also, as I say, very very amazed that they can handle  
7 that type of caseload.

8           Q           And from your knowledge and experience  
9 and your years both prosecuting and defending cases, these  
10 attorneys, the Assistant Public Defenders in the office  
11 here, do they have the same obligation to provide  
12 constitutionally effective assistance of counsel to their  
13 clients as a private attorney does?

14          A           That's absolutely true, and that's  
15 explicitly stated in the Rules of Professional Conduct in  
16 the comments.

17          Q           I want to ask you briefly about those  
18 rules, and you were a member of the committee that undertook  
19 the provision of the rules. Some of the rules are up here  
20 on this exhibit. And I want to ask if you have an opinion

21 on certain of these rules and how they are applied to the  
22 caseloads that the assistants in the Knox County PD's Office  
23 has to handle; for example, Rule 1.1, the requirement of  
24 competent representation?

25           A           Well, as we stated in this rule, that



1 competent representation, as you see in this rule, not only  
2 requires legal knowledge--and there's no doubt in my mind  
3 that the attorneys that practice in the Public Defenders  
4 Office have the required legal knowledge and skill, but  
5 certainly the more you have, the more workload you have and  
6 the more individuals you represent, your thoroughness and  
7 your preparation will decline. And that's certainly been my  
8 experience with caseloads in our office. It would be the  
9 same in the Public Defenders Office, that with these  
10 caseloads the ability to prepare as thoroughly as you would  
11 with a lesser caseload goes without saying that it's not  
12 possible.

13 Q Rule 1.4 talks about the obligation of an  
14 attorney to see that his client is reasonably informed. Do  
15 you have an opinion about that rule and how the caseload  
16 would affect that?

17 A It would be similar. I mean, the more  
18 individuals you represent the more individuals you have to  
19 communicate with on a daily basis. That would vary from  
20 court to court, obviously, but for instance, Mark Stephens

21 said in his affidavit, I believe, that there were three  
22 lawyers in Felony Sessions that handle 66 cases per day. To  
23 be able to effectively communicate with that number of  
24 individuals in one day is a daunting task to say the least.

25 Q If some action was taken to give relief

1 to the Public Defenders Office, do you have an opinion as to  
2 whether that might help create the effective assistance of  
3 counsel plans for the future?

4           A           I certainly do. I think that the  
5 proposal--having read the petition, that the proposal to  
6 remove the six attorneys from Misdemeanor Sessions and put  
7 them into the courts that are the most overworked is not  
8 something that is attractive necessarily, but it's the most  
9 attractive of the alternatives, and it certainly would  
10 relieve pressure in the other courts and allow those  
11 attorneys to be more thorough in their preparation and to  
12 communicate more effectively to those clients about their  
13 options and their alternatives.

14           Q           Mr. Dillard, are you familiar with the  
15 terms "horizontal representation" and "vertical  
16 representation" as it applies to representation of clients?

17           A           Yes.

18           Q           And based, again, upon your knowledge and  
19 experience, I think you're aware that the Public Defenders  
20 Office uses a horizontal method of representation. How does

21 the horizontal method as opposed to a vertical method of  
22 representation--in your opinion, how does that affect the  
23 ability of the Public Defenders Office to provide adequate  
24 representation?

25           A           Well, it really increases the amount of

1 the work. It's kind of reinventing the wheel. Certainly,  
2 in our office what we do is the vertical type  
3 representation. I can't imagine in our office that we would  
4 have one attorney at one level and another attorney having  
5 to come in at the next level of representation and in any  
6 way have an efficient operation.

7 Certainly, if you're staffing by court as opposed  
8 to staffing by client, that does create a problem, but I  
9 understand that in the situation that the Public Defenders  
10 Office finds themselves in now there's not another choice.  
11 But it is a less effective means of effective representation  
12 of the client.

13 Q And finally, Mr. Dillard, do you have an  
14 opinion, based upon your knowledge and experience, whether  
15 you, your office, with your knowledge and experience, could  
16 represent the number of cases similar to the numbers handled  
17 by the Knox County Assistant Public Defenders in the manner  
18 required by the Tennessee Rules of Professional  
19 Responsibility?

20 A My office couldn't, and I'll give you an

21 example if I might. We have three attorneys in our office  
22 that do predominantly criminal work. The total experience  
23 in years, we probably approximate 65 years in experience.  
24 Those three attorneys, when you compare the work that is  
25 done let's say in Division II, where there are three

1 attorneys in Division II of Criminal Court, there were 395  
2 new cases in fiscal 2007; 395 cases in that one court with  
3 three attorneys. I tried to put myself and my two partners  
4 who do criminal work in the position of those three  
5 attorneys, and I cannot imagine having 395 cases in one  
6 year, the three of us.

7 I'd do one of two things. I'd probably have a  
8 heart attack. If I didn't, I'd be overjoyed and I'd go out  
9 and hire two more attorneys to handle the workload. It's  
10 not that I wouldn't like to have that many cases, but three  
11 of us couldn't do it. We would have to have help. And that  
12 is just one example. It's a good example because that's the  
13 same number of attorneys we have, but our firm could not do  
14 it. I could not do it.

15 I understand seven criminal lawyers in Criminal  
16 Court, if you had 544 clients, that's 77 per lawyer, and as  
17 I understand the petition, 30 of those cases are set for  
18 trial in the next 90 days. There's no way that my firm  
19 could do that or would do that.

20 Q And perform adequately under the Rules of

21 Professional Responsibility?

22 A That's correct.

23 Q I have no further questions.

24 MR. MOORE: No further questions of Mr.

25 Dillard.



1 JUDGE MCGEE: Mr. Dillard, you've been  
2 active in the local bar for many years. If we were to grant  
3 the relief that Mr. Stephens is seeking, we would have to  
4 appoint private counsel to represent a lot of misdemeanor  
5 cases. We've already received indications from the  
6 Administrative Office of the Courts that there are only "X"  
7 number of dollars available to pay those attorneys. There's  
8 a substantial likelihood that we would have to call upon  
9 attorneys to represent people in Misdemeanor Sessions Court,  
10 knowing that they wouldn't get paid. What do you think the  
11 reaction of the local bar might be to that?

12 A I think the majority, Your Honor, of  
13 lawyers in this community understand their rights or their  
14 responsibilities under the Rules of Professional Conduct,  
15 and I don't think they would like that. They didn't the  
16 last time it happened. But we managed to do it. I think  
17 the majority of attorneys in this county would respond.

18 JUDGE CERNY: Since that is your  
19 viewpoint, Mr. Dillard, do you mind telling me your address?

20 MR. DILLARD: I believe you have it, Your

21 Honor.

22 JUDGE EMERY: Let me ask a follow-up  
23 question to that, because that was December of '91, I think.  
24 There's some people who had said back then--well, we made  
25 the decision it was the burden of the license and you'd

1 utilize the entire bar population, civil lawyers, criminal  
2 lawyers, patent lawyers. What about the argument that if  
3 you use them how can they--if they're not trained in  
4 criminal law, how could they effectively provide  
5 representation to their clients they've been appointed to?

6           A           Well, the rules do apply to that, but as  
7 an attorney--for instance, as I recall, the Mayor at that  
8 time and Jim Clayton and others had law licenses, and I  
9 remember getting a call from Mr. Clayton scared to death  
10 about coming down and representing someone in Criminal  
11 Court. If the attorney truly believes that it would render  
12 ineffective assistance of counsel for that person to come  
13 into court and represent someone on a misdemeanor, they are  
14 excused. What they would do would be call--

15                   JUDGE EMERY: Hire you or somebody else.

16                   MR. DILLARD: --me or somebody else.

17                   JUDGE EMERY: At their expense.

18                   MR. DILLARD: Those of us that practice  
19 criminal defense will end up with more of the share than  
20 others. We realize that. I just hope we don't end up with

21 the caseload that the Public Defender has in Criminal and  
22 Sessions Court.

23 JUDGE EMERY: Anybody else?

24 (No response.)

25 JUDGE EMERY: Thank you for coming down,

1 Mr. Dillard.

2 MR. DILLARD: Thank you, Your Honor.

3 MR. MOORE: We call Mr. Don Bosch as our  
4 next witness.

5 JUDGE EMERY: Were you previously sworn?

6 MR. BOSCH: I was not.

7 JUDGE EMERY: (Swears the witness.)

8 EXAMINATION

9 BY MR. MOORE:

10 Q Would you please state your full name for  
11 the Court.

12 A Donald A. Bosch.

13 Q And Mr. Bosch, like Mr. Dillard, you are  
14 known to the members of the Court. Would you briefly, for  
15 the record, just state your background, your experience, and  
16 where you are now in your firm.

17 A I graduated from the University of  
18 Tennessee Law School in 1988. Prior to my graduation, while  
19 in law school, I worked for approximately two years after my  
20 graduation. I was a law clerk and associate for Joe Tipton,

21 now Judge Tipton, the presiding judge in the Court of  
22 Criminal Appeals. After Judge Tipton ascended, as we like  
23 to say, I left and started my own practice, which initially  
24 was Bosch & Silvey. It became Bosch, Silvey & Lawson and,  
25 ultimately, Bosch Law Firm.

1           Today we are three full-time lawyers: myself, Ann  
2 Short Bowers and Melissa Franklin, as well as an Of Counsel  
3 position for Jim B. Miller, who previously was an associate  
4 of mine, who is a full-time faculty member at the University  
5 of Tennessee. In addition to the attorneys employed on the  
6 staff in my office, we have three full-time administrative  
7 people, all possessing four-year college degrees; a  
8 30-hour-a-week college intern; and an independent contractor  
9 private investigator, Dick Trulia (phonetic), who is a  
10 retired agent for the FBI.

11           Q           Mr. Bosch, do you know Mark Stephens?

12           A           I know Mark well.

13           Q           And are you familiar with the Knox County  
14 Public Defenders Office?

15           A           I am.

16           Q           Are you familiar with the courts here in  
17 Knox County, both Sessions and Criminal Courts, that handle  
18 criminal cases?

19           A           I am. A large part of my practice is  
20 within those courts.

21                   Q                   Okay. Just a rough guess, what percent  
22 of your practice is criminal and what percent is in the Knox  
23 County courts?

24                   A                   An estimate of about 75 percent of the  
25 entire practice in my office is criminal defense. Of that I



1 would estimate--and I hadn't reviewed that, but I would say  
2 somewhere between 50 and 70 percent of that resides in Knox  
3 County, either in State Court or locally in Federal Court.

4 Q I believe you submitted an affidavit in  
5 this case?

6 A I did.

7 Q Mr. Bosch, are you familiar with the  
8 obligations of an attorney under the U.S. Constitution and  
9 the Tennessee Constitution and under the Tennessee Rules of  
10 Professional Conduct?

11 A I am.

12 Q And have you reviewed the sworn petition  
13 in this case and the attachments to it?

14 A I have.

15 Q Presently, about how many cases do you  
16 and the other two attorneys in your office handle?

17 A In preparation for this hearing and this  
18 petition we reviewed that, as we do every year. We  
19 currently have approximately 200 active cases, and we define  
20 that as cases that are not on return status; that is,

21 they've come to disposition in cases that are not simply  
22 cited traffic ordinances through the Municipal Court and  
23 occasionally in Sessions Court in the Traffic Division.  
24 That's active cases within our office of all criminal types.

25 Q That would be about 60 or 70 per

1 attorney; is that correct?

2 A If you factored it that way, yes.

3 Q Could you tell the Court very briefly  
4 just how you and the others in your office typically handle  
5 a case from when it comes in, through the conclusion?

6 A Sure. And I'll use--we have a  
7 significant DUI practice, and how we handle those, there  
8 will be an initial meeting with the client. That meeting  
9 typically takes anywhere from an hour and a half to two and  
10 a half hours. We tell every client at the beginning of that  
11 meeting that the first thing we're going to do is get some  
12 general information about them and who they are, talk about  
13 the facts of the case, and then we sit down and explain the  
14 process, what they should generally expect, and then we  
15 discuss the other business matters, costs and how long it  
16 might take and how to reach us to get ahold of us.

17 After that, we'll then make our various requests  
18 for information and conduct our investigation: in DUI cases,  
19 typically a video. (Inaudible) college intern will do a  
20 complete transcript of that video. It will then typically

21 go to one of my two associates, generally Melissa Franklin,  
22 sometimes directly to me, and there will be a secondary  
23 review of that, and then they'll present that to me.

24           In addition, that video, we compare it with all the  
25 reports that are on file which we will gather. There's an

1 alcohol influence report, an arrest report, sometimes an  
2 accident report, and certainly the warrants. Occasionally,  
3 we will retrieve the 911; that is, the radio transmissions  
4 that have been recorded and the likewise prepared  
5 transcripts of that for comparison and use if needed. We  
6 will interview witnesses provided by our client that might  
7 be useful and on occasion interview the police officers  
8 themselves. That's changed a little bit with the advent of  
9 video, and sometimes there's strategic reasons not to  
10 interview a police officer prior to the court hearing.

11           After we do that, we typically talk and meet with  
12 the client again, go through those findings, look for their  
13 analysis, and then the morning of court we have them in, and  
14 they will always start in our office. We tell every client,  
15 whether it be Sessions or Criminal, they'll meet us in our  
16 office between 8:30 and 8:45. This gives us a brief  
17 opportunity to again remind them what to expect and to talk  
18 to them and answer any questions. We will then walk to the  
19 courthouse together and do whatever we need to do in court.  
20 That's a typical process on a misdemeanor or a Sessions case

21 in our office.

22 Q And I take it from the fact that that's  
23 what you do you believe that's what's necessary to provide  
24 adequate representation to your clients?

25 A Absolutely.

1           Q           Would you comment briefly, from your  
2 experience, on the investigation of criminal cases? Could  
3 you comment about the resources that are available to Mark  
4 Stephens at the Public Defenders Office and the sources  
5 available to the District Attorney's Office?

6           A           Well, there's a very distinct difference  
7 in how cases are presented, I guess, at that level. Once a  
8 case reaches the District Attorney's Office, it has  
9 ostensibly been made at some level by law enforcement. Law  
10 enforcement has investigated and determined there's been  
11 probable cause for an offense, often has--may have forensic  
12 evidence, may have statements, may have a number of things,  
13 at which point warrants or on some occasions a presentment  
14 are taken, and at that point the D.A.'s office often is  
15 involved. Occasionally, they may be involved before, but  
16 the important function of that is much of the investigatory  
17 function has been done by the inception of the charge.  
18           Further, if other investigation needs to be done  
19 the sources of the State far outweigh what, frankly, are  
20 available to any member of the defense bar, but particularly

21 an organization like the Public Defenders Office, in that  
22 laboratories are available, all those things are available,  
23 I don't suggest at no cost, because there are tax dollars  
24 involved, but certainly at the request of a district  
25 attorney's office further investigation and/or forensic



1 analysis, if necessary, law enforcement is available for  
2 further interviews. Although some of that exists at the  
3 level of the Public Defenders Office, it is far more limited  
4 and often far more expensive, frankly, because it has to be  
5 created versus already having been in existence.

6 Q Again, based on your experience, do you  
7 believe that an assistant public defender or, really,  
8 anybody, defense attorney in private practice, should rely  
9 solely on the State's investigation of a case?

10 A No. In fact, I think that that is per se  
11 ineffective assistance of counsel. The suggestion that I  
12 have on occasion heard, that the State turns over their  
13 evidence and that should be enough, is frankly one that is  
14 in error. We routinely find, for example, that materials  
15 that are turned over to us are simply inconsistent with what  
16 we later discover in our independent investigation. A  
17 perfect example of that is we often are given reports or  
18 even warrants or sworn statements by police officers that  
19 when we compare it to a video are distinctly different than  
20 what has been provided to us, and if a lawyer, if private or

21 in the Public Defenders Office, did not do that  
22 investigation, the court will rely solely on the State's  
23 production of evidence through Rule 16 or some less formal  
24 basis of that court. It is something that any defense  
25 lawyer should never do.

1           Q           Mr. Bosch, based on your knowledge, your  
2 experience, your review of the sworn petition in this case,  
3 your knowledge of the Knox County Public Defenders Office,  
4 its caseloads, and the unique obligation that a defense  
5 attorney has, do you have an opinion of the ability of the  
6 Knox County Public Defenders Office to provide effective  
7 assistance of counsel with the caseloads it currently  
8 has?

9           A           The numbers that are currently reflected  
10 in Mark Stephens' petition lead me to the inescapable  
11 conclusion that they are per se ineffective and that there  
12 are just simply not enough lawyer hours in a day to be able  
13 to adequately serve and handle in representing individuals  
14 accused of a crime.

15          Q           Finally, Mr. Bosch, if your office was in  
16 the same situation with the current caseloads that were  
17 assigned to the Assistant Public Defenders, in your opinion  
18 would your office be able to handle the ethical and  
19 constitutional requirements for representation?

20          A           I'm afraid not. We could not.

21                   Q           Thank you.

22                               MR. MOORE:   The Court may have questions  
23 for Mr. Bosch.

24                               JUDGE EMERY:   Anyone have any  
25 questions?

1                   (No response.)

2                   JUDGE EMERY: Is this something you felt  
3 like for sometime? Are you surprised this action wasn't  
4 brought earlier?

5                   MR. BOSCH: To some extent, yes. I mean,  
6 I've always been concerned about the caseload levels for any  
7 public defenders office. I've watched. As this Court  
8 knows, I'm in Sessions Court if not daily nearly daily. I  
9 have watched the Public Defenders, frankly, work very, very  
10 hard. But in very cursory fashions have those--for example  
11 (inaudible) clients, and clearly clients just don't have the  
12 time they may desire with their lawyers. There are  
13 certainly clients who also choose not to be invested in the  
14 process, due to no fault of the Public Defenders Office,  
15 but sometimes even that happens in private practice, and we  
16 educate our clients and explain to them that they need to be  
17 invested in this process, that it's very important.

18                   I've been worried about this for  
19 sometime, and I'm just frankly amazed that Mark Stephens'  
20 office does as good as they do, given the loads that they

21 have, but very worried at what appears to be just a lack of  
22 time that they have to adequately prepare the cases in  
23 Sessions Court.

24 JUDGE EMERY: Thank you for your opinion.

25 JUDGE CERNY: How would you handle giving

1 this office some relief? What would you suggest, in light  
2 of what you've seen?

3 MR. BOSCH: I've thought about that, and  
4 I'll be candid with this Court, and Mark knows that we've  
5 discussed this. I think that the relief that Mark has  
6 requested is appropriate, and I think it is within his  
7 purview as the head of the Knox County Public Defenders  
8 Office to determine what best serves his offices.

9 A concern that I might have, should Mark  
10 be relieved or his office be relieved from Sessions Court,  
11 is it's also useful for young lawyers to begin their  
12 practices in that court, and although that is true, I don't  
13 think that's something that this Court really can take into  
14 account; that, Well, we're going to be serving your young  
15 lawyers by not removing you from this court. I think that  
16 it's Mark Stephens' decision in terms of where best he needs  
17 relief and ask this Court for that relief in order to  
18 effectively serve the most clients he can.

19 So I guess, Judge Cerny, to answer your  
20 question, I think it would be an appropriate remedy for this

21 Court to relieve the Knox County Public Defenders Office of  
22 this, but I would have concerns that younger lawyers would  
23 be moving into more complicated cases that they may not be  
24 ready for, but I'm sure that Mark Stephens' has planned for  
25 that if that were to happen, and that experience could



1 likewise be used to groom those lawyers to take more  
2 sophisticated and difficult cases.

3 Have I answered your question? You're  
4 making faces I'm used to seeing in Preliminary Hearings.

5 JUDGE CERNY: If your office took  
6 appointed cases--

7 MR. BOSCH: And we do on occasion, but  
8 they're typically in Criminal Court.

9 JUDGE CERNY: Right. Assuming that your  
10 office took a large volume of appointed cases and your  
11 caseload became such that you had to seek out relief,  
12 wouldn't you come to the courts that appoint you or your  
13 office and say, For a time I can't take any more cases?

14 MR. BOSCH: That would certainly be one  
15 way to handle the problem. I would suggest to the Court  
16 that ethically I would not let my numbers get to the level,  
17 because in private practice I would have more control over  
18 that situation, but I would not let my numbers reach the  
19 numbers, frankly, that exist in the Knox County Public  
20 Defenders Office. I would come to the court and say, Remove

21 me from that appointed list, which as the right of a lawyer  
22 ostensibly I could do.

23 JUDGE EMERY: Any further questions?

24 (No response.)

25 JUDGE EMERY: Thank you, Mr. Bosch.

1 MR. BOSCH: Thank you, Your Honor.

2 MR. BAHNER: (Indicates.)

3 JUDGE EMERY: Okay. A question from  
4 Judge Jackson.

5 JUDGE JACKSON: Is this going to be  
6 different, or is this going to be the same that we've heard  
7 already?

8 MR. BAHNER: This is going to be a little  
9 different, but it's not going to be long. But it comes at  
10 it from a different standpoint because he's teaching.  
11 You've heard a little bit of it from one of his students,  
12 and if Your Honors don't want to hear it we won't go into  
13 it, but he comes at it from a--it will not be long.

14 JUDGE MCGEE: If it's a different  
15 perspective--

16 JUDGE EMERY: Yes, it's coming from a  
17 teaching perspective, and Mr. Black's well-recognized in  
18 this community.

19 MR. BAHNER: Your Honor, he has not been  
20 sworn.

21 JUDGE EMERY: (Swears the witness.)

22 EXAMINATION

23 BY MR. BAHNER:

24 Q Professor, for the record would you

25 please state your name.

1           A           I am Jerry P. Black, Jr.

2           Q           What is your occupation?

3           A           I'm a law professor at the University of  
4 Tennessee College of Law.

5           Q           How long have you been admitted to  
6 practice law?

7           A           Since 1968.

8           Q           Among your teaching duties, do you teach  
9 legal clinic?

10          A           I do.

11          Q           How do you view the importance of  
12 teaching legal clinic to students at the University of  
13 Tennessee School of Law?

14          A           I think that is one of the more important  
15 courses because it transitions the student from the  
16 classroom to the beginning of law practice, and it helps the  
17 student understand what it means to undertake representation  
18 of an individual in a particular case.

19          Q           In connection with the clinic work, do  
20 you have cases pending in the General Sessions Court of Knox

21 County?

22 A We do.

23 Q About how many do you have, typically,  
24 during a semester?

25 A It depends on the number of us teaching,

1 but we have an 8 to 1 student-to-faculty ratio in the  
2 clinics out there, so with three of us teaching that would  
3 mean we had 24 students, and a typical caseload would  
4 probably be three criminal cases during a semester or 72  
5 total.

6 Q You know Mark Stephens, of course?

7 A I do.

8 Q And you're familiar with the office of  
9 the Knox County Public Defender?

10 A I am.

11 Q Are you familiar with the caseloads of  
12 that--

13 A I am.

14 Q Do you see the Knox County Public  
15 Defenders in action?

16 A I see them regularly in action.

17 Q Briefly describe to this Court how you  
18 teach your students to prepare a case in one of the criminal  
19 divisions in General Sessions Court.

20 A Well, we generally get an appointment

21 either from the court or we'll undertake to take a case that  
22 the Public Defenders are otherwise appointed in and  
23 substitute him. The first thing we do, particularly if it's  
24 a new case, is we will get the warrant and the arrest report  
25 so that the student would have some idea about what the



1 charge was, and then they would be expected to look at the  
2 law and make sure they appreciated the elements that are  
3 involved in the case and the range of punishment that the  
4 client was facing, and then they would call him and set up  
5 an initial interview with the client.

6           After setting up this initial interview with the  
7 client, they would conduct the initial interview, get the  
8 client's version of what happened in a particular case, get  
9 the client to sign releases if it was needed to get any  
10 medical information that might be pertinent, mental health  
11 records that might be pertinent, and then he will begin to  
12 investigate the case. They would certainly want to talk to  
13 any witnesses that the client provided. They would ask for  
14 the 911 tapes that have been mentioned before, if there were  
15 any involved in this case, the videos in all cases, and any  
16 other supporting documents that might be available. Having  
17 done that, they would probably attempt to investigate any  
18 witnesses that were available for the State, including the  
19 police officers.

20           Q           Why is that important?

21                   A               Well, in order--you need to find out what  
22   their version of what happened is, and you have oftentimes--  
23   I think, as Don Bosch indicated, the video may tell you what  
24   in fact went down, but you'd want to talk to the officers  
25   because there are things that may have occurred that might,

1 for instance, might--their version as to the seriousness of  
2 the events and what they may be recommending with the  
3 District Attorney's Office for a disposition.

4 Q How long do these initial interviews  
5 ordinarily take, in your experience?

6 A Probably an hour and a half to two hours.

7 Q How important is investigation after that  
8 initial interview?

9 A It's critical.

10 Q Why is it critical?

11 A Well, I think your obligation as an  
12 attorney is to try to get the best result you can for that  
13 particular client, and until you know the facts and until  
14 you have some idea about the strength of the State's case  
15 and the strength of the defense's case, you don't have the  
16 ability, in my opinion, to adequately counsel the client as  
17 to his or her options.

18 Q Is that important even if your client is  
19 guilty?

20 A Yes, I think so. One thing, I think that

21 perhaps confidence in the criminal justice and in their  
22 ability to accept the consequences of their actions depends  
23 in some part as to whether they think they got a fair shake  
24 and whether they thought their lawyer did a good job, and  
25 they are looking for their lawyer to tell them what the

1 strengths and the weaknesses of the State's case is and what  
2 the consequences of the various options are, and you can't  
3 do that unless you do the investigation.

4 Q Are interviews required, frequently, more  
5 than the initial interview?

6 A Typically. I think in most cases you  
7 have at least two or three interviews, even in a defender's  
8 case.

9 Q Assuming that the Knox County Public  
10 Defenders Office can schedule only 30 minutes per interview  
11 with clients, do you think that's adequate?

12 A No.

13 Q And what if they can't interview at all,  
14 until they go to court for the first time?

15 A I think it's probably analogous to  
16 whatever happened if I went to a doctor and they just saw me  
17 for five minutes and then sent me on my way with whatever  
18 the prescription was. I wouldn't think I got adequate  
19 medical representation, and I don't see how the clients feel  
20 that they've had adequate legal representation. And, at

21 least from my standpoint, it's important to distinguish  
22 getting a good result for the client from the process.

23 I think that the Public Defenders Office gets  
24 amazingly good results for their clients, but you could get  
25 a good result for the client by flipping a coin. And I

1 don't mean to suggest that they do that, but why we have a  
2 process and why we have these ABA standards is because we  
3 want to have confidence in the fairness of the process so  
4 that it's less likely we'll get the wrong result.

5           Obviously, the result is the most important thing  
6 to the litigant, so if an officer doesn't show and I get to  
7 walk out of there, that's probably a good day. But from the  
8 lawyer's standpoint and from the criminal justice system,  
9 that's not necessarily the best result, and you want to have  
10 confidence and fairness of the process, and the only way you  
11 can have confidence and fairness of the process is everybody  
12 does their job.

13           Q           Is respect for the rule of law by the  
14 people who go through the system, is that an important  
15 factor?

16           A           I think it's important. I think it's  
17 critical. I mean, people are less likely (inaudible). One  
18 of the things that's amazing - and I know the judges  
19 experience that - people come to court not dressed like you  
20 I would if we were coming to court, and they come, I think,

21 partly because they don't have respect for the system, and  
22 they don't have respect for the system because they don't  
23 think the system treats them fairly, and I think that's a  
24 real problem. And then when it comes to carrying out your  
25 obligations, I think once again they don't think they were



1 treated fairly so therefore their respect for the law is not  
2 very great.

3 Q One of the things that you mentioned to  
4 me when you were teaching me about this process, since I  
5 don't practice criminal law, is the characteristics of so  
6 many people who come through the criminal system who require  
7 appointed counsel and the fact that there are many crises in  
8 their lives and they're going from one thing to another.  
9 Could you please briefly comment on that...briefly?

10 A I've been--

11 (Interruption in the proceedings.)

12 BY MR. BAHNER:

13 Q If you could speak up a little bit.

14 A Yes. I've been representing people who  
15 cannot afford counsel for 40 years, and it seems to me that  
16 one of the things that we try to impress upon our students  
17 is that these are poor people, and it seems to me that if I  
18 faced a criminal charge the most important thing in my life  
19 would be to resolve that criminal charge, but they operate  
20 from crisis to crisis.

21                   And so we have clients, the Public Defender type  
22 clients, whose lights are about to be cut off, their  
23 children...their children are sick, they don't have money or  
24 health insurance, so they can't get them to the doctor. So  
25 the most important thing in their life may not be their

1 criminal problem. They sort of rotate from one crisis to  
2 the next. And so you have to build that into your practice  
3 if you're representing poor people, because they're not like  
4 the typical client who has a legal problem or a typical  
5 client that has a medical problem. They've got a myriad of  
6 problems, and whatever wheel is squeaking that day is the  
7 one that gets the oil.

8           Q           Based on your knowledge of the caseloads  
9 handled by the lawyers in the Public Defenders Office, do  
10 you think that they can comply with the ethical requirements  
11 of the Tennessee ethics rules, Rule 8?

12           A           I think that's impossible. There's just  
13 not enough hours in the day, despite their dedication to  
14 their work.

15           Q           Can they provide effective assistance of  
16 counsel as required by the U.S. Constitution and the State  
17 Constitution?

18           A           I don't think so.

19                       MR. BAHNER: Does the Court have any  
20 questions for Professor Black?

21                   (No response.)

22                   JUDGE EMERY:   Apparently not.

23                   MR. BAHNER:   Thank you for coming.

24                   MR. BLACK:    Thank you.

25                   JUDGE MCGEE:   Thank you, Professor.

1                   MR. BAHNER: Could I have just a minute,  
2 please?

3                   JUDGE EMERY: Yes.

4                   (Off the record discussion.)

5                   MR. BAHNER: May it please the Court,  
6 that is the Public Defender's case and we rest.

7                   JUDGE EMERY: Okay. We anticipate  
8 hearing from the State Attorney General, but let's take  
9 maybe a 15-minute recess before we do that, give you plenty  
10 of time. We stand in 15-minute recess.

11                  (Recess was taken.)

12                  JUDGE EMERY: All right. We have  
13 sworn in Douglas Dimond from the State Attorney Generals  
14 Office.

15                  MR. DIMOND: I've not been sworn in, Your  
16 Honor.

17                  JUDGE EMERY: He was sworn this morning,  
18 but you want to capture his testimony. Maybe summarize a  
19 little bit, but you can go on with what you--

20                  (Off the record discussions held simultaneously.)

21 MR. DIMOND: I was not sworn. I'm here  
22 as a lawyer.

23 MR. BAHNER: Oh, I'm sorry--

24 JUDGE MCGEE: It was our understanding  
25 that you were not going to give testimony, that you were

1 simply going to argue a position.

2 MR. DIMOND: That's correct, Your Honor.

3 MR. BAHNER: I'm not sure I understood  
4 that.

5 JUDGE CERNY: In point of fact, it seems  
6 to me that the terminology that we did use previously, if I  
7 recall correctly, was amicus or something analogous to that;  
8 is that right?

9 MR. DIMOND: We did not--or at least I  
10 did not, and I apologize--you all did not understand our  
11 position today. I thought we made it fairly clear from the  
12 beginning that we wanted some kind of party status. We were  
13 so informal last summer that we were just participating, so  
14 I think the term that I used is--as I recall, I wrote you  
15 all a letter and asked to participate. I did not specify  
16 party or nonparty, but we had not had a petition filed at  
17 that time either. Now we've got a petition as of March 26,  
18 and our response to that petition includes the argument we  
19 ought to be included as a party.

20 JUDGE CERNY: Your response filed

21 yesterday?

22                               MR. DIMOND: My response was filed--yes,  
23 we asked for party status as of yesterday, and we, on  
24 Friday, also filed a separate response to the petition. We  
25 too are under-resourced, Your Honor.



1 JUDGE MCGEE: When we set up this  
2 hearing, I think it was our general understanding that, yes,  
3 we do recognize it to be a judicial proceeding but not an  
4 adversarial one, so this business of being called a party or  
5 intervening or so forth doesn't really matter that much to  
6 us. We simply want to know what your position is, what your  
7 argument would be with relation to what's been presented to  
8 the Court.

9 MR. DIMOND: Well, particularly, I  
10 understand that, and I think it is to some extent an  
11 adversarial proceeding by the fact that we've got a  
12 significant interest at stake that absent our participation  
13 could be jeopardized.

14 JUDGE MCGEE: We're allowing you to  
15 participate. We're inviting you to participate.

16 MR. DIMOND: I understand, and really, if  
17 that were all there was I wouldn't care what you called me,  
18 but that's not all there is. If my client is not pleased  
19 with the result in this case, we would be foreclosed from  
20 any review if we were not a party. So we are very clearly

21 asking some sort of party status. I'm not saying we're  
22 going to appeal, but we just want to be able to have that  
23 right, because it's not much of a right to exercise to  
24 simply be able to talk without any party rights of review--

25 (Interruption in the proceedings.)

1                   MR. DIMOND: This is an important public  
2 question and, especially in this day and age of limited tax  
3 dollars, a significant amount of money for the State to ante  
4 up. So I do, respectfully, want party status. I can review  
5 quickly for the record my arguments on that. And I  
6 apologize, but a little more repetition today probably won't  
7 hurt matters too much.

8                   I've cited the Rules of Civil Procedure.  
9 Your Honor's correct that they don't apply here, but I  
10 argued earlier that the Rules of Civil Procedure provide  
11 good guidance, and the root of the Constitution has a  
12 fundamental right of notice and opportunity to be heard that  
13 even a state agency should have, and with 2.5 million  
14 dollars at stake AOC ought to have that right to be heard  
15 and to participate in this proceeding. (Indicates.) Pardon  
16 me, Your Honor. I have a cold and I may be interrupting  
17 from time to time.

18                   This petition, we argue, should be  
19 dismissed for two reasons. One is lack of subject matter  
20 jurisdiction. This Court is a court of limited jurisdiction

21 and can only rule upon such matters that are expressly  
22 authorized by statute. The case I cited to Your Honors,  
23 Caldwell versus Woods, involved an interpretation of the  
24 statute that said General Sessions Court correct its  
25 judgment, and the court in that case used that statute to

1 set aside the judgment. And this is how straight and narrow  
2 the Court of Appeals viewed this and strictly it took that  
3 express statutory authorization.

4                   The Court of Appeals said, No, you're not  
5 authorized--you're only authorized to correct the judgment,  
6 that doesn't include voiding it altogether, setting it  
7 aside. People might think it does. There's no such express  
8 statutory authorization. Similarly, there's no such express  
9 statutory authorization in this case, and if you look at  
10 Rule 13--I noted that the other side has done a really good  
11 job in talking about how they apply a class of cases or a  
12 class of the court, but if you look at the explicit language  
13 of Rule 13 it says when appointed counsel for an indigent  
14 defendant, the trial judge, one judge, should make the  
15 ruling.

16                   The rule goes on to say the court shall  
17 not make an appointment unless counsel makes a very  
18 convincing case that "having the appointment," in the  
19 singular. They're talking case by case. I don't think  
20 there's any (inaudible) reading that rule. The word

21 "unreasonable" might--well, I can't argue that there's some  
22 efficiency to doing it the way they're doing it here, I just  
23 don't think there's any authority to do it. So I highly  
24 doubt we have subject matter here, that you all have subject  
25 matter jurisdiction, with all respect to the Court, to

1 entertain this action as it's phrased in the petition and  
2 to excuse the Public Defender from a class of court.

3 I also think there's a problem with the  
4 evidence. I know you've heard a lot of it today, and I know  
5 you saw a lot of it in the petition. It is the burden upon  
6 the Public Defender to make a case - assuming you can hear  
7 this case - to make a case by clear and convincing evidence.  
8 Clear and convincing evidence is evidence that leaves no  
9 serious doubt, and I think there is some serious doubts that  
10 were raised in the petition in the facts alleged by the  
11 Defender himself.

12 First of all - and this is sort of  
13 related to the jurisdictional argument - the petition states  
14 that the problem really isn't in this Court. It's certainly  
15 not in the Misdemeanor Division of this Court. It's  
16 elsewhere. The six attorneys--and for better or worse we're  
17 stuck with that horizontal representation of six attorneys  
18 assigned to that court. They're not the ones in crisis, at  
19 least according to the petition. It's the DUI and Felony  
20 Divisions of this court, and more importantly, the Criminal

21 Courts that are in trouble. Therefore, I don't think it  
22 makes sense for you to excuse people who aren't providing  
23 effective assistance of counsel so that the Public Defender  
24 can shift resources. That's really his decision but not the  
25 courts.



1                   I think maybe even more importantly, some  
2 of the figures in the petition--we want to question the  
3 argument in the petition. The petition talks in terms of,  
4 We won't be able to continue to comply with effective  
5 assistance of counsel. I take it as a tacit admission  
6 up-to-date that they pretty much have been.

7                   What we did is took a look at the figures  
8 from the last several years, 2006. That's on page eight.  
9 You have the response that we filed on Friday, and I will  
10 tell you what was filed. I'm pretty sure that the response  
11 is only, what, ten pages, and our motion to intervene is two  
12 or three. So it's, I hope, not unduly burdensome.

13                  Look at that chart, Table 1 and Table 2  
14 on page 8. Look at cases. They're down. From 2006 to 2007  
15 new cases went from sixty-three fifty to fifty-seven sixty.  
16 That's a drop of almost 10 percent. We've gotten some  
17 updates from the Public Defenders Office that show projected  
18 caseload - if I understand it, and folks testified to today  
19 - of about forty-three oh three cases. These are the  
20 misdemeanor cases. So we're down again. From fifty-seven

21 sixty to forty-three oh three is considerable. That's,  
22 what, 20 percent, right, if my math is right? Overall cases  
23 are down.

24               New cases in 2006 were 12,028; 2007 - 10,791.

25 That's a 10 percent decrease. And they continue to go down.

1 Total cases, excuse me, fifteen two forty; thirteen  
2 twenty-two forty-four to 11,511 from '06 to '07 to '08.  
3 Again we're seeing constant decreases in caseloads here, and  
4 they've been obtaining great results thus far and they're  
5 effectively assisting their clients. I can't see how, when  
6 a caseload dropped, they should be excused from attending  
7 court.

8                               There's a few more points I'd like to  
9 make. I think those are the two--the ones I hit upon in the  
10 response. But even as I was looking at some of the  
11 statistics we were seeing up there about the caseloads--I'm  
12 not a trial lawyer. I don't do criminal work, at all. I  
13 did a little bit as a clerk in the Attorney General's  
14 Office. I am an appellate attorney. I do a lot of appeals,  
15 and I look--I've got 25 appeals. Twenty-five appeals is not  
16 much to do. If I had a caseload that just consisted each  
17 year of 25 appeals I'd be in heaven, because that would be  
18 too easy. I routinely do them in a matter of days.

19                               As we look on, do you trust your own  
20 eyeballs? You're the ones that are presiding in these

21 cases. Is the court chaos? If your court's not chaos--I  
22 don't know about Criminal Court, but I will say the figures  
23 in Criminal Court would be more than that than they are in  
24 Misdemeanor. There's no--there's just about 20 to 30  
25 percent caseloads. If you're not seeing chaos in your

1 courts and clearly ineffective assistance of counsel, and  
 2 you're seeing worse results from the Public Defenders--  
 3 you've got the best sense of anybody. If the Public  
 4 Defenders are obtaining worse results, not showing up, not  
 5 doing their job, you've got--I would assume you have a  
 6 pretty good sense of that. If you are seeing adequate  
 7 representation - I'll put it to you, with these figures -  
 8 don't make a case for excusing the Public Defender from your  
 9 courts. So, again, trust yourselves. I have no further  
 10 argument.

11 JUDGE EMERY: Any questions of Mr.  
 12 Dimond?

13 (No response.)

14 MR. DIMOND: Thank you, Your Honors.

15 JUDGE MCGEE: Thank you.

16 JUDGE EMERY: All right. Is there any  
 17 other...

18 MR. BAHNER: May I respond briefly?

19 JUDGE EMERY: Yes, sir.

20 MR. BAHNER: I don't want to unduly

21 prolong this.

22                               Mr. Moore's been out and I've been out.

23 I didn't see the petition--or the motion to intervene until  
24 yesterday morning. I didn't see the brief which was filed  
25 until this morning at 8:15 or 8:30. Through some snafu we

1 didn't get it, although Mr. Dimond did send it and the  
2 secretaries found it later. Mr. Moore was out of the  
3 office. But I would make just a few observations.

4                   The first is that the Attorney General's  
5 position does not touch on Rule 8 or Rule 13, which are  
6 fundamental. Money, as important as that is to the State,  
7 is irrelevant to the issue of doing an ethical job and a  
8 constitutionally effective job in representing an indigent  
9 defendant. And I think that the Attorney General, with all  
10 due respect, is simply wrong.

11                   If the Court has power to appoint, and I  
12 don't think that anybody questions the fact that the Court  
13 has power to appoint to the Public Defenders Office within  
14 the Court, whether working as individuals or en banc, has  
15 the power to grant relief. And the ethical responsibility  
16 of the Public Defender is to bring this to the attention of  
17 the court by clear and convincing evidence.

18                   Your Honors have heard what has been  
19 said. I think it is significant what Tom Dillard testified  
20 to and what Don Bosch testified to and what Professor Black

21 testified to. They see these Public Defenders working and  
22 Mr. Dimond has never seen them working, and all we have from  
23 him is the fact that it's going to cost money. It would  
24 cost less money for the Public Defenders Office to have some  
25 more help.



1                   Justice Lyle Reid, in the series of  
2 letters referred to in connection with the 1991 case, said  
3 at the end of that exchange that all other considerations  
4 must be subordinated the right of the accused to have  
5 effective assistance of counsel as required by law. I  
6 submit that that is still the case and that is still the  
7 measure by which a judgment must be made.

8                   The last thing I would say is that--we're  
9 going to file a revised affidavit of Professor Lefstein,  
10 because although we furnished copies of the petition to the  
11 Attorney General's Office at the same time it was filed in  
12 March, we didn't really have a chance to respond. If Your  
13 Honors are interested we will be glad to respond to the  
14 brief, the motion to dismiss, as he characterized it, if you  
15 want us to, sometime next week. I don't know whether--

16 JUDGE EMERY: If anybody wants to submit  
17 supplemental authority we'll give them the opportunity to do  
18 so.

19 MR. BAHNER: All right. We will--

20 JUDGE CERNY: Let me just suggest this to

21 you, that we would be interested in anything you choose to  
22 provide.

23                               MR. BAHNER: All right. We will file  
24 something, if it's all right, by the end of next week. This  
25 week is the Tennessee Bar Association, and if it's all right

1 we'll do it next week. Thank you, Your Honors.

2 JUDGE EMERY: Thank you.

3 MR. BAHNER: And we do appreciate your  
4 willingness to hear us en banc. We realize this is an  
5 extraordinary thing to ask for, and we're glad that you've  
6 done it. It seems to us that it was so much more efficient  
7 to do it this way. The alternative is to just do it  
8 repeatedly in individual courts, and I just don't think that  
9 that's good for the system. Thank you.

10 JUDGE MCGEE: Thank you.

11 JUDGE EMERY: Thank you, and thank  
12 everybody for appearing here today. We will receive any  
13 supplemental filings, affidavits and memorandums of law and  
14 briefs, and then take this matter under advisement and  
15 notify everyone at a later date. Thank you.

16 JUDGE MCGEE: Thank you.

17 (Court was adjourned.)

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C E R T I F I C A T E

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3 STATE OF TENNESSEE:

4 COUNTY OF KNOX :

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7 I, Vickie L. McGee, Court Reporter and Notary

8 Public at Large, do hereby certify that I reported in

9 machine shorthand the above testimony, and that the

10 foregoing pages, numbered from 1 to 163, inclusive, were

11 typed under my personal supervision and constitute a true

12 and accurate record of the proceedings.

13 I further certify that I am not an attorney

14 or counsel for any of the parties, nor a relative or

15 employee of any attorney or counsel connected with the

16 action, nor financially interested in the action.

17 Witness my hand and seal this 25th day of

18 June, 2008.

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21

Vickie L. McGee  
Court Reporter and Notary Public for  
the State of Tennessee

22

My commission expires: 10/13/09

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